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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

ROBERT E. GRAHAM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Harry Preston Henshaw III
Counsel of Record
10 Hale Street
Charleston, WV 25301
(304) 347-2040
henshaw.law@frontier.com

Counsel for Petitioner

September 10, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

A certificate of innocence is required to obtain compensation for unjust imprisonment under § 28 U.S.C. 2513 and § 28 U.S.C. 1495. § 28 U.S.C. 2513(a)(2) requires that the party seeking compensation "... did not by misconduct or neglect cause or bring about his own prosecution." The issue is what conduct may be taken into consideration by the trial court in denying a certificate of innocence in light of the foregoing statutory language.

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The Published Opinion of the Fourth Circuit Court of Appeals (App. 2a to 39a) is not yet reported. Judge Motz wrote the majority opinion in which Judge Michael joined. Judge Gregory wrote a dissenting opinion.

The Fourth Circuit's unpublished *per curiam* opinion reversing the District Court (App. 56a to 67a) is reported at 684 595 F. Supp. 2d 681, 684 (S.D.W.Va. 2008).

The District Court's Memorandum Opinion (App. 41a to 51a) is reported at 2006 WL 2527613 (S.D. W.Va. Aug 30, 2006).

JURISDICTION

The Fourth Circuit entered it's decision on June 16, 2010 and its Mandate on August 11, 2012 that its judgment should take effect (App. 1). This court has jurisdiction under § 28 U.S.C. 1254(1). to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1495

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim for damages by any person unjustly convicted of an offense against the United States and imprisoned.

28 U.S.C. § 2513

(a) Any person using under section 1495 of this title must allege and prove that: (1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on a new trial or hearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction and (2) he did not commit any of the acts charged or his acts, deeds or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution. . . . (e) The amount of damages awarded shall not exceed $100,000 for each 12-month period of incarceration for any plaintiff who was unjustly sentenced to death and $50,000 for each 12-month period of incarceration for any other plaintiff.

STATEMENT OF FACTS

As noted in the Fourth Circuit's opinion reversing Mr. Graham's conviction, he was the subject of a "media maelstrom." (App. 65a) The importance of the press in Mr. Graham's prosecution and conviction cannot be overstated. Against this backdrop, Mr. Graham was indicted on a number of counts. This indictment was superceded adding an additional count that Mr. Graham embezzled his accrued sick pay from his employer, Council on Aging, Inc. The final indictment was on 39 counts. He was convicted of embezzling his accrued sick pay and no other counts in a **bench** trial. *(Memorandum Opinion 2006 U.S.*

Dist. LEXIS 62296) Under 18 U.S.C. § 666(a)(1)(A) this was a federal crime. The Fourth Circuit reversed Mr. Graham's conviction holding that he did not need an additional resolution from the Board to cash in the last two increments of his sick pay since the prior approval of the Board for three previous requests to cash out his sick pay were without limitation.

> "The pertinent question is whether the Board authorized him to cash out his sick leave in June/July 2003 and January/February 2004. We answer this question in the affirmative because on this record it is undisputed that the Board repeatedly authorized Graham to cash out his accrued sick leave without any limitations." (App. 67a)

Mr. Graham spent a little over twelve months in prison before his conviction was reversed. Mr. Graham then moved the Fourth Circuit for a Certificate of Innocence under 28 U.S.C. § 2513. The Court entered an order stating that Mr. Graham's "conviction was not based on technical or procedural grounds, but law and facts; therefore, a Certificate of Innocence is appropriate in accordance with 28 U.S.C. § 2513. Nonetheless, the District Court is the most appropriate Court to issue the Certificate." (App.54a).

Mr. Graham moved the District Court for a Certificate of Innocence. The United States Attorney filed a statement with the District Court that it did not object. (App. 52a). The District Court denied Mr. Graham's Motion. The District Court held, in its Memorandum Opinion, that Mr. Graham was not entitled to a Certificate of Innocence primarily for three reasons. The first was because of his

"misconduct." This misconduct did not entail a violation of any law but was basically a judgment ostensibly based on Mr. Graham's moral character. Second, the District Court held that Mr. Graham brought about his prosecution by virtue of his negligence when he did not request Board approval for cashing out his last increment of sick pay. Third, the District Court held that 28 U.S.C. § 1495 contemplates, "the compensation of victims of prosecutorial overreach." The District Court stated that its holding was justified by the last phrase of 28 U.S.C. § 2513(a) (ii). That subsection requires that for a person to qualify for a Certificate of Innocence it is necessary that "he did not by misconduct or neglect cause or bring about his own prosecution."

THE OPINION OF THE MAJORITY

In upholding the District Court's denial of a Certificate of Innocence the majority of the panel of the Fourth Circuit began with a lengthy review of Mr. Graham's alleged misconduct noted by the lower court. This misconduct generally involved what the prosecution had asserted was his excess compensation and benefits from his corporation, Council on Aging, Inc.[1] These allegations were not refuted at Mr. Graham's trial since they were not criminal.

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[1] Council on Aging ran several senior centers in southern West Virginia for which it received grants and, additionally, had a large in-home health care business which employed several hundred people. The in-home health care business was reimbursed through Medicaid billings for its services in maintaining elderly infirm individuals in their home. It was never asserted by the prosecution that the grants received were not properly used or that the Medicaid billing was not proper.

The majority opinion does not contend that Mr. Graham is guilty of any related crime, so he satisfies the requirement of 28 U.S.C. § 2513(a)(1). The majority focuses on Mr. Graham's misconduct and neglect that it asserts resulted in bringing about his own prosecution. The majority specifically rejects the narrow reading of subsection (a)(2) in *Betts* as being "cramped." (App. 20a, 26a) The *Betts* case was relied on by Mr. Graham. The Seventh Circuit, in *Betts,* held as follows:

> "In a moral sense, perhaps, a person who engages in conduct that a prosecutor or trial court mistakenly believes to constitute a criminal offense might be said to have "brought about" his own prosecution, on the theory that he would not have been charged had he comported himself in a more upstanding fashion. Yet, construing the statute in that way would require courts to assess the virtue of a petitioner's behavior even when it does not amount to a criminal offense. We decline to interpret section 2513(a)(2) in that fashion."
>
> Instead, we conclude that before the petitioner can be said to have caused or brought abut his prosecution within the meaning of § 2513(a)(2), he must have acted or failed to act in such a way as to mislead the authorities into thinking he had committed an offense. . . ."
>
> In these circumstances, a defendant has it within his means to avoid prosecution but elects

not to do so, instead acting in such a way as to ensure it." *Betts*.[2] (App. 81a - 82a)

The majority advances a broader standard which would allow a court to make a moral judgement in determining whether to deny a Certificate of Innocence. The majority also rejects the Seventh Circuit's interpretation of "neglect" as when a defendant has it "within his means to avoid prosecution but elects not to do so." Specifically, the majority thinks it appropriate to find Mr. Graham's failure to obtain board approval for cashing in the last two increments of his sick pay was neglect that brought about his prosecution, even though the majority acknowledges that they had previously ruled that such approval was not necessary and overturned Mr. Graham's conviction for embezzlement on this ground.[3] (App. 67a)

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[2] *Betts v. United States*, 10 F.3d 1278 (7th Cir. 1993). Mr. Betts, a lawyer, was sentenced to three months in prison for criminal contempt when he did not comply with a court order to appear. This conviction was reversed and the Seventh Circuit found that the lower court never indicated that Betts' presence in court was indispensable stating a court order was ambiguous so a finding of criminal contempt is precluded. Mr. Betts sought a Certificate of Innocence from the trial court The court held that Mr. Betts had brought about his own prosecution by his neglect in failing to appear in court and so did not satisfy § 2513(a)(2). The Seventh Circuit stated that, "the statute expressly requires a causal connection between the petitioner's conduct and his prosecution; it does not preclude relief simply because the petitioner engaged in misconduct or neglect.

[3] In support of its position, the majority cites an Eighth Circuit case involving an off track betting service, *United States v. Racing Services, Inc.*, 580 F.3d 710 (8th Cir. 2009). In that the principle officer of Racing Services, Inc. was convicted on federal gambling

The majority cites a number of court cases generally for the proposition that trial courts should be given broad discretion in determining whether a Certificate of Innocence should be granted and that the intent of the statute was to place limitations on compensation for unjust imprisonment.[4]

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and money laundering charges. After serving some time in prison, her conviction was reversed. She applied for a Certificate of Innocence from the federal district court. The district court concluded that its principle officer had likely violated "numerous sections of the North Dakota code" and, therefore, she had failed to show that she had committed "no offense" as required under § 2513(a)(2). The Eighth Circuit upheld the lower court saying that the district court was not clearly erroneous when it concluded that Racing Services, Inc. and it's principle officer were not truly innocent of all state law offenses as required for a Certificate of Innocence. The Eighth Circuit did not analyze § 2513 in any detail.

[4] A brief synopsis of these cases follows:

***Eastridge et al*, District of Columbia (2009):** After serving a long prison term for murder, the conviction of Eastridge et al was reversed and they were found to be innocent. Eastridge then brought a claim for compensation for unjust imprisonment. The United States did not dispute that the Petitioners fulfilled their requirement of § 2513(a)(1) in that their convictions were reversed on the grounds that they were not guilty of the offence of which they were charged. The government based its argument on the last provision of § 2513(a)(2) and argued that Mr. Eastridge in varying ways engaged in misconduct that caused or brought about his prosecution. The District Court in a well reasoned decision cited the Fifth Circuit in *Osborne* and the Seventh Circuit in *Betts*. The Court quoted from *Betts* at 1285 that observed that the statute: "Does not preclude a Certificate of Innocence simply because the petitioner engaged in misconduct or negligence, period." The Court held that Eastridge, et al qualified for a Certificate of Innocence. *Eastridge v. United States*, 602 F. Supp. 2d 66 (D. D.C. 2009).

***Osborn*, Fifth Circuit (1963):** In this case a United States Army court martial found Mr. Osborn guilty of striking an officer and he was sentenced to a lengthy prison term. While in prison Mr. Osborn killed another inmate and was tried again by court martial for murder and sentenced to life. The Supreme Court subsequently ruled a court martial did not have jurisdiction in such situations. Consequently, Osborn was released from prison even though it was undisputed that he had actually committed the murder. The lower court denied Mr. Osborn a Certificate of Innocence stating that he had failed to show that he had not committed the acts for which he was charged as required by § 2513(a)(2). The Fifth Circuit upheld the district court on appeal stating that Osborn's conviction was overturned for jurisdictional reasons. *Osborn v. United States*, 322 F.2d 835 (5th Cir. 1963).

***Keegan, et al*, District Court, S.D. New York (1947):** Mr. Keegan was a member of the German American Bund immediately before World War II. On at least one occasion he gave a talk to German Americans at least implying that they should not serve in the army against Germany and indicating they could avoid such service by claiming to be a conscientious objector. He was found guilty of conspiring to counsel persons to evade, resist and refuse service in the United States Armed Forces. The Supreme Court overturned this conviction stating that the evidence in this case was insufficient to sustain conviction of the petitioners." Mr. Keegan applied for a Certificate of Innocence. The lower court denied the Certificate of Innocence stating that it was "definitely not satisfied, that his conduct in connection with such discharge did not constitute a crime or offense against the United States, namely the crime of counseling evasion of the selected service law that is a substantive offense as distinguished from the conspiracy. Since, in the opinion of the lower court, Mr. Keegan was guilty of a related offense, his Certificate of Innocence was denied under the statute preceding § 2513(a)(2). *United States v. Keegan*, 71 F. Supp. 623 (D. N.Y. 1947).

***Rigsbee*, U.S. Court of Appeals, District of Columbia Circuit (1953):** Rigsbee was convicted and imprisoned for murder and assault with a deadly weapon. Because of a defect in the trial proceedings, he was retried and the jury in the second trial found

THE OPINION OF THE DISSENT

The Dissent notes that the majority creates a split between the circuits, and vigorously disagrees with its interpretations of the statute. (App. 28a) The Dissent agrees with the Seventh Circuit in *Betts* and states

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him innocent even though he admittedly killed the man as claimed by stabbing him 17 times. In denying Mr. Rigsbee compensation for his unjust imprisonment under the predecessor to § 2513(a)(2), the Court stated that the statute in effect makes the judge "an expert thirteenth juror (who must) concur in the verdict of not guilty." p. 72. This logic could not be applicable to Mr. Graham's case where the judge was also the jury in a bench trial. *Rigsbee v. United States*, 204 F.2d 70 (D.C. Cir. 1953).

***Humphrey*, U.S. Court of Federal Claims (2002):** The Court of Claims does not look behind the Certificate of Innocence in determining whether compensation is due a plaintiff for unjust imprisonment under § 2513 and § 1495. The Court of Claims cases have held that an appellate court's decision overturning a conviction on its merits is not alone enough to qualify someone for compensation under the foregoing statute. The plaintiff must obtain a Certificate of Innocence which closely follows the language of the statute. The Court of Claims commented on the requirements for the Certificate of Innocence but its comments are dicta. *Humphrey v. United States*, 52 Fed. Cl. 593 (2002).

***Brunner*, Sixth Circuit (1952):** Mr. Brunner's conviction for violation of postal law. At the trial, Mr. given testimony that substantially contributed to his conviction. On appeal, this evidence was found to have been improperly admitted and his conviction was reversed after serving part of his sentence. Mr. Brunner then sought and obtained a certificate of innocence from the trial court which did not consider Mr. Brunner's wife's testimony under the predecessor to § 2513. The government appealed the decision and the 6th Circuit remanded the case directing that the trial court consider Mrs. Brunner's testimony. *United States v. Brunner*, 200 F.2d 276 (6th Cir. 1952).

that the majority errs in requiring Mr. Graham to "conform to some amorphous, unwritten code of conduct," in order to obtain a Certificate of Innocence. (App. 28a) The Dissent argues that the term misconduct or neglect means such things as giving a false confession, removing evidence, or failing to disclose clearly exculpatory evidence and is essentially an estoppel defense that protects the United States Treasury against defendants who could have thwarted prosecution.

The Dissent points out that "one cannot cause one's own prosecution by engaging in the very conduct which was found to be noncriminal." (App. 32a) Thus, if Mr. Graham's cashing in the last two increments of his sick pay did not constitute embezzlement it cannot be said that this brought about his prosecution through neglect in not obtaining such approval from the board.

The Dissent argues at some length that neglect must have some proximate relationship to the alleged criminal activity. Therefore, neglect only exists where it was clear at the time that action should have been taken to avoid prosecution and the defendant neglected to take such action. For the court to use hindsight and hold that certain action could have been taken by the defendant that would have resulted in his avoiding prosecution when such action was not required is inherently unreasonable. This requires that the defendant be clairvoyant and foresee his prosecution and unjust conviction and take action that would have resulted in avoiding his unjust imprisonment.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHAT CONDUCT IS APPROPRIATE TO CONSIDER IN DENYING A CERTIFICATE OF INNOCENCE WHICH IS PREREQUISITE FOR COMPENSATION OF UNJUST IMPRISONMENT.

The courts agree that 28 U.S.C. § 2513 provides compensation for individuals unjustly imprisoned and to exclude from compensation: (1) those individuals whose conviction was overturned on a technicality (2) those who were guilty of a related crime and (3) those who could have avoided prosecution and neglected to do so. Beyond this who may be excluded has been the subject of much confusion among the courts. For instance, the District court in Mr. Graham's case stated that the purpose of the statute was to compensate those who were the victims of prosecutorial overreach. (App. 46a) The District court in *Rigsbee v. United States*, 204 F.2d 70 (D.C. Cir. 1953) p.72, cited by the majority, stated that the statute makes the judge a thirteenth juror. (As previously noted Mr. Graham was convicted in a bench trial.) This uncertainty has existed for years and has been accentuated by the Fourth Circuit's published opinion which clearly splits with the Seventh Circuit. This needs to be resolved and some direction given to trial courts regarding what conduct is appropriate to be considered. The general perception of the bar is that a trial court that presided over a conviction overturned on its merits will be reluctant to issue a Certificate of Innocence. Thus, if a trial court can deny

a Certificate of Innocence based on a nebulous standard, it is likely to do so.

It is difficult to imagine how someone who has been unjustly imprisoned must feel. But, certainly, the court should assure that the intent of the statute to compensate in some minimal manner those individuals whom the judicial system has failed is assured. If the Court thinks it appropriate, this case might be disposed of through a summary proceeding, since the opinions of the dissent in this case and the Seventh Circuit in *Betts* are well-reasoned dispositions of the issues.[5]

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[5] *Eastridge v. United States*, 602 F. Supp. 2d 66 (2009) sets forth a thoughtful and thorough analysis of § 2513 and the cases thereunder.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari and reverse the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

Harry Preston Henshaw III
Counsel of Record
10 Hale Street
Charleston, WV 25301
(304) 347-2040
henshaw.law@frontier.com

Counsel for Petitioner

APPENDIX

APPENDIX

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FILED: August 11, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-6013
(5:06-cr-00025-1)

UNITED STATES OF AMERICA,
Plaintiff - Appellee

v.

ROBERT E. GRAHAM,
Defendant - Appellant

MANDATE

The judgment of this Court, entered 6/16/2010, takes effect today.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(1) of the Federal Rules of Civil Procedure.

/s/ Patricia S. Connor, Clerk

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 09-6013

ROBERT E. GRAHAM,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of West Virginia,
at Beckley.
David A. Faber, Senior District Judge.
(5:06-cr-00025-1)
Argued: January 27, 2010
Decided: June 16, 2010

Before MICHAEL, MOTZ, and
GREGORY, Circuit Judges.

Affirmed by published opinion. Judge Motz wrote the majority opinion, in which Judge Michael joined. Judge Gregory wrote a dissenting opinion.

COUNSEL

ARGUED: Harry Preston Henshaw, III, Charleston, West Virginia, for Appellant. Hunter Paul Smith, Jr., OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee. ON BRIEF: Charles T. Miller, United States Attorney, Charleston, West Virginia, for Appellee.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

After the Government charged Robert E. Graham with 39 criminal offenses, he opted for a bench trial. The district court found him not guilty of all offenses except that charged in Count 14—embezzlement from his employer, an organization receiving in excess of $10,000 annually in federal funds. *See* 18 U.S.C. § 666 (2006). Graham appealed his sole conviction, and we reversed, holding that the Government had offered insufficient evidence to prove, "beyond a reasonable doubt, that Graham knowingly stole any money" as alleged in Count 14. *See United States v. Graham*, 269 F. App'x 281, 286 (4th Cir. 2008) (per curiam). Graham then moved for a certificate of innocence, a necessary prerequisite to recovery of damages from the Government for unjust conviction and imprisonment. *See* 28 U.S.C. §§ 1495, 2513 (2006). Concluding that Graham had not met the statutory prerequisites for a certificate of innocence, the district court refused to grant him one. Graham appeals. Because the district court did not abuse its substantial discretion in denying the certificate, we affirm.

I.

A.

Graham served as executive director of two related non-profit corporations—the Council on Aging, Inc. ("COA") and All Care Home and Community Services, Inc. ("All Care")— for more than twenty years. The corporations, which shared a Board of Directors, provided services to the elderly and infirm and received well over $10,000 annually in federal funds.

For many years, Graham had no written employment contract with either corporation. However, in December 2001, he prepared and submitted employment contracts, which the Board's president signed. The contracts raised Graham's annual salary from $125,000 to $185,000.

In March 2002, COA agreed to assume responsibility for All Care's administrative expenses, including Graham's salary and benefits, and entered into an amended employment contract with Graham so providing. This amended contract contains the following sick-leave provision:

> Beginning on the date of employment sometime around May 1975 until the termination of employment, [Graham] shall be entitled to accrue two days (16[] hours) per month paid sick leave time. Sick leave may be accumulated from year to year. Sick leave benefits may be converted into cash compensation if used for illnesses or upon the termination of this contract.
>
> Thus, the contract authorized Graham to convert his sick- leave benefits into cash compensation under only two

> circumstances—"illness[ ] or . . . termination of th[e] contract."

Nevertheless, in January 2003, without meeting these conditions, Graham sought Board permission to convert some of his sick leave to cash. Graham offered the Board the following brief justification for the request: "I am requesting permission to buy out some of my sick leave. It shows in the books as an accrual. I can already bu[y] out my vacation." The Board granted his request, and on that same day, Graham converted 1200 sick-leave hours to $106,728. Two more times in the spring of 2003, again without meeting the contractual conditions, Graham 1Section 666 prohibits an agent of an organization receiving in any one year period federal benefits in excess of $10,000 from "embezzl[ing], steal[ing], obtain[ing] by fraud or otherwise without authority knowingly convert[ing] to the use of any person other than the rightful owner or intentionally misappl[ying]" property owned or controlled by that organization and carrying a value of $5000 or more. 18 U.S.C. § 666. Graham's intent constituted the only disputed element at trial. requested and received Board permission to convert some of his sick leave to cash. In all, during 2003, Graham converted sick leave to over $160,000 in cash.

Graham never again asked the Board to approve his con version of sick leave to cash. But in both January and February 2004, again without meeting either of the contractual conditions, he converted sick leave to cash. In total, during 2004, Graham converted sick leave to over $30,000 in cash.

In response to ongoing state investigations of COA, the Board called an emergency meeting in March 2004, at which it revised the terms of Graham's employment

contract and ordered Graham to return the money he received for sick leave in 2003. That same month, Graham heeded his attorney's advice and repaid all the money he had received for sick leave in both 2003 and 2004.

In July 2006, a federal grand jury in the Southern District of West Virginia returned a second superseding 39count indictment against Graham. Both counts 13 and 14 charged him with embezzling money from COA by unauthorized conversion of sick leave to cash. *See* 18 U.S.C. § 666.[1] Count 13 charged him with embezzling $160,092.81 in calendar year 2003; Count 14 charged him with embezzling $31,129 in 2004.

Graham pled not guilty to all counts and waived his right to a jury trial. During his five-day bench trial, the Government offered substantial evidence that at all relevant times, the COA Board members were elderly (their average age exceeded 80), hard of hearing, financially unsophisticated, and strongly influenced by Graham. The Government argued that this evidence required the district court to find that Graham could, and did, take advantage of the Board at every turn and so find him guilty of all 39 counts in the indictment.

The district court refused to so find. Rather, after the trial, at which Graham did not testify, the court

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[1] Section 666 prohibits an agent of an organization receiving in any one year period federal benefits in excess of $10,000 from "embezzl[ing], steal[ing], obtain[ing] by fraud or otherwise without authority knowingly convert[ing] to the use of any person other than the rightful owner or intentionally misappl[ying]" property owned or controlled by that organization and carrying a value of $5000 or more. 18 U.S.C. § 666. Graham's intent constituted the only disputed element at trial.

acquitted Graham of all crimes but that charged in Count 14—embezzlement from his employer of $31,129 through sick leave conversions to cash in 2004. Thus, the court found Graham not guilty of mail fraud, wire fraud, tax violations, embezzlement related to the purchase of a plasma television and the maintenance of a SEP IRA plan, or embezzlement with respect to the 2003 sick leave conversion charged in Count 13. *United States v. Graham*, No. 5:0600025, 2006 WL 2527613 (S.D.W. Va. Aug. 30, 2006).

The court explained its differing finding as to Counts 13 and 14 as follows:

> Evidence establishes that, in 2003, defendant went to the boards of COA and All-Care and requested board approval prior to cashing in sick leave. The board's sanction of defendant's behavior, regardless of the ability of its members to fully comprehend the intricacies of the organizations' finances, leads this court to conclude that defendant did not violate 18 U.S.C. § 666(A)(1)(a) as to Count Thirteen. Even though the court doubts that the board members comprehended in detail all of the matters before them, they did consent. Their assent, regardless of their level of competence, creates a reasonable doubt as to Count Thirteen.
>
> On the other hand, the evidence at trial did establish that defendant was guilty of Count Fourteen. It shows clearly that he did not return to the board and seek the same approval for his last buy out of sick leave even though he knew he was supposed to do so.
>
> . . . .

> . . . [T]he conclusion is inescapable that Graham cashed in the sick leave [in January and February 2004] without the approval of his board, knowing he needed board approval, thereby effectively stealing the money or converting it to his own use.
>
> From the evidence taken at trial it is clear that defendant, an employee, took this money from COA without having any board approval whatsoever. These transactions each constituted major changes of the sort that required board approval. The fact that Graham sought board approval for the [2003] cash outs of sick leave is compelling evidence that he knew such approval was required. Graham cavalierly disregarded the board and treated large amounts of COA's money as if it were his own, diverting it to his personal use and to the detriment of those whom COA and AllCare were created and funded to serve.

Id. at *34.

As to the other counts—related to the plasma television, SEP IRA plan, and federal taxes – the court concluded that although Graham's conduct was "doubtlessly improper and unethical," *id.* at *1, and "inconsistent with Graham's duties as Executive Director," *id.* at *2, the Government had failed to prove beyond a reasonable doubt that Graham harbored the requisite intent to commit the crimes charged. *Id.* at *12, *4; *see* 18 U.S.C. § 666; 26 U.S.C. § 7206 (2006). The court similarly acquitted Graham of various fraud charges, *see* 18 U.S.C. §§ 1341, 1343, 1346 (2006), finding that the Government had not proven that Graham devised a scheme to defraud his employer.

Graham, 2006 WL 2527613, at *25. The district court concluded that

> [t]he events leading to this indictment are improper and outrageous and cannot be condoned by the court. Graham failed miserably to fulfill his duties as a public servant, engaging in conduct that squandered public resources and adopting a lifestyle that reflected discredit upon COA and AllCare, their directors and employees. Bad conduct in and of itself, however, does not equal criminal conduct. To convict a defendant of a crime, the government must establish beyond a reasonable doubt by competent evidence each and every element of each and every crime charged. Except for Count Fourteen, the government has failed to do so.

Id. at *5. The court imposed on Graham a within-Guidelines sentence of two years in prison and a $10,000 fine, and ordered him to forfeit any portion of the funds charged as stolen in Count 14 that he had not already returned.

Graham appealed, and we reversed his sole conviction on sufficiency grounds. *Graham*, 269 F. App'x at 28687. We concluded that, because in 2003, "[t]he Board repeatedly authorized Graham to buy out his accrued sick leave and did not place any restrictions on . . . the timing of these cash outs," his failure to obtain Board approval in 2004 for the cash payments of sick leave was "clearly insufficient for purposes of establishing Graham's intent to steal funds." *Id.* at 286. Although Graham's written contract permitted him to receive cash payment for sick leave only upon illness or termination, we held that "the Board's decisions in January, March, and May of 2003 [to

permit cash payment of sick leave in circumstances not permitted in the employment con tract] resulted in a de facto amendment that overrode these restrictions." *Id.*

We pointed to several other facts suggesting Graham did not intentionally steal from COA, including the Board's decision to maintain Graham as executive director in March 2004 after the federal and state investigations of COA had begun, Graham's decision to continue to obtain cash for sick leave after the federal investigation began in early 2003, and his filling out the proper paperwork and obtaining approval from the Board treasurer for all of the sick-leave conversions to cash. *Id.* at 28687. Although we recognized that certain other facts—for example, that Graham's conversions of sick leave ran afoul of COA's written personnel policies—"may demonstrate that Graham is not eligible for the priesthood," we found them "irrelevant so far as the district court's determination of guilt is concerned." *Id.* at 285 n.5.

We issued our mandate on March 20, 2008, and on that same day the district court entered an order adjudging Graham not guilty. At that time, Graham had spent thirteen months in prison.

B.

On July 21, 2008, Graham filed an action in the United States Court of Federal Claims seeking damages from the Government for unjust conviction and imprisonment. *See* 28 U.S.C. §§ 1495; 2513. Two months later, Graham moved in this court for a certificate of innocence, a necessary prerequisite to the Federal Claims action. *Id.* § 2513. We dismissed the motion without prejudice, noting that the "reversal of appellant's conviction was not based on technical or

procedural grounds, but law and fact; therefore, a certificate of innocence is appropriate in accordance with . . . § 2513." However, we concluded that "the district court is the most appropriate court to issue the certificate."

Graham then moved for a certificate of innocence in the district court, which the court denied. After examining the relevant statutory language, the court concluded that § 2513 does not mandate the payment of public funds to everyone acquitted after being imprisoned. Rather, the statute "orders compensation to the truly innocent who have been prosecuted through no fault of their own." *United States v. Graham*, 595 F. Supp. 2d 681, 684 (S.D.W. Va. 2008). The court noted that the few precedents interpreting § 2513 (and its predecessors) agreed that the statute "provides a remedy to be applied only in exceptional cases." *Id.*

The district court determined that it was "unable to reach . . . the conclusions mandated by 28 U.S.C. § 2513" as a necessary condition to the award of a certificate of innocence. *Id.* at 686. Specifically, the Court found itself "not persuaded that Graham is in fact innocent," nor able to "conclude that he did not by misconduct or neglect bring about his own prosecution." *Id.*

The court first catalogued the trial evidence, which it believed demonstrated that Graham was not actually innocent: Graham (1) "selected and controlled the Board[ ] . . . which w[as] composed entirely of the elderly," (2) took home an annual salary of $185,000, which was "excessive by comparison to the pay of others in similar positions," (3) "used employees on company time to perform personal services for himself

and his family," (4) "bought . . . a $6,000 television[ ] through COA to get a better price and avoid sales taxes," (5) "manipulated a SEP IRA to benefit his family," and (6) "assumed a lavish lifestyle including regular visits to a 'gentle men's club.'" *Id.* at 685. This evidence led the court to conclude that "Graham operated [COA and All Care] for years as his own personal domain and for the financial benefit of himself and his family." *Id.*

The court then explained why it found that Graham's "misconduct or neglect cause[d] or br[ought] about his own prosecution." 28 U.S.C. § 2513(a)(2). First, the court found that the enumerated evidence of Graham's wrongdoing "certainly shows that, in a general sense, [Graham] brought about his own prosecution." *Graham*, 595 F. Supp. 2d at 686. Specifically, the court found that Graham was "at the very least negligent" in not seeking Board approval before converting his sick leave to cash in 2004, as he had in 2003. *Id.* The court explained that Graham "either simply neglected to do so or he purposely failed to do so for some specific reason such as the belief his request would not be approved. In either event his own conduct brought about his prosecution . . . ." *Id.*

The district court expressly recognized that on appeal, we had "carefully reviewed the evidence against Graham on the count of conviction and concluded that it was insufficient to establish his guilt beyond a reasonable doubt." *Id.* The court did not challenge this holding. Rather, the court explained that while the evidence at trial had been found "insufficient to prove [Graham's] guilt beyond a reasonable doubt," this evidence left the court unconvinced "that Graham is in fact innocent, [or] that [Graham] did not by

misconduct or neglect bring about his own prosecution." *Id.*

Graham timely noted this appeal.

II.

This case presents our first opportunity to address § 2513. Nor has the Supreme Court ever construed, or even cited, the statute. But the clear statutory language, its legislative history, and the cases that have previously considered the statute pro vide us substantial guidance.

Section 2513, the "[u]njust conviction and imprisonment" act, provides:

> (a) Any person suing under section 1495 of this title [which waives sovereign immunity for suits seeking money damages from the Government, to be filed in the Court of Federal Claims] must allege and prove that:
>
> > (1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, . . . as appears from the record . . . of the court setting aside or reversing such conviction, . . . and
> >
> > (2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

> (b) Proof of requisite facts shall be by a certificate of the court or pardon wherein such facts are alleged to appear, and other evidence thereof shall not be received.

28 U.S.C. § 2513.

Thus, the plain language of § 2513 requires that one seeking a certificate of innocence (who has not been pardoned) *prove* three predicates. He must prove that (1) "the record . . . of the court setting aside or reversing" his conviction demonstrates that it did so "on the ground that he is not guilty of the offense of which he was convicted," § 2513(a)(1); (2) he "did not commit any of the acts charged" or those acts "constituted no crime against the United States, or any State, Territory or the District of Columbia," § 2513(a)(2); and (3) "he did not by misconduct or neglect cause or bring about his own prosecution," *id.*

After setting forth these three requirements, § 2513 specifically characterizes them as "requisite facts." § 2513 (b). Then, the statute expressly sets forth the *only* way (again absent par don) that a person can demonstrate these "requisite facts" in the Court of Federal Claims—by a certificate from the court in which "such facts are alleged to appear." *Id.* This intricate statutory scheme renders several conclusions inescapable.

First, Congress clearly did not provide in the unjust conviction and imprisonment act an avenue for monetary compensation to all whose criminal convictions are reversed after incarceration. *See Betts v. United States*, 10 F.3d 1278, 1284 (7th Cir. 1993); *United States v. Keegan*, 71 F. Supp. 623, 635 (S.D.N.Y. 1947). Rather, "the phrasing of the Act and its legislative history proclaim the care with which its

framers guarded against opening wide the door through which the treasury may be assailed by persons erroneously convicted." *United States v. Brunner*, 200 F.2d 276, 280 (6th Cir. 1952); *see also* H.R. Rep. No. 752299, at 2 (1938), *quoted in Keegan*, 71 F. Supp. at 633 (noting that Congress enacted this statute to provide only "certain innocent persons" the ability "to present a claim for financial indemnity" upon "showing their innocence"). As the Eighth Circuit has recently recognized, § 2513 "compensates only the truly innocent." *United States v. Racing Servs., Inc.*, 580 F.3d 710, 712 (8th Cir. 2009) (citing *Betts*, 10 F.3d at 1284).[2]

Second, and just as clear as its intent to permit only the "truly innocent" to receive a § 2513 certificate, Congress expressly directed that one seeking the certificate bear the burden of not only "alleg[ing]" but also "prov[ing]" entitlement to the certificate. 28

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[2] The legislative history of § 2513 clearly demonstrates a congressional desire to limit the class of persons entitled to relief under the statute. In commenting on the proposed legislation, Attorney General Homer Cummings noted that "[i]deal justice would seem to require that in the rare and unusual instances in which a person who has served the whole or part of a term of imprisonment, is later found to be *entirely innocent*," he should "receive some redress." S. Rep. No. 75202, at 3 (1937) (emphasis added), *quoted in Keegan*, 71 F. Supp. at 632. The Attorney General went on to distinguish the "entirely innocent," who would merit a certificate of innocence, from those who would not—the "more frequent[ ]" cases in which reversal was based "on the ground of insufficiency of proof or on the question as to whether the facts charged and proven constituted an offense under some statute." *Id.* He concluded that any proposed legislation should "necessar[ily] . . . separate from the group of persons whose convictions have been reversed, those few who are in fact innocent of any offense whatever." *Id.*

U.S.C. § 2513(a); *see also Betts*, 10 F.3d at 1286; *Rigsbee v. United States*, 204 F.2d 70, 72 (D.C. Cir. 1953); *Keegan*, 71 F. Supp. at 63536; *Burgess v. United States*, 20 Cl. Ct. 701, 704 (Ct. Cl. 1990). Moreover, because it constitutes a waiver of sovereign immunity, "[t]he unjust conviction statute has always been strictly construed." *Burgess*, 20 Cl. Ct. at 704; *Osborne v. United States*, 322 F.2d 835, 838 (5th Cir. 1963); *Keegan*, 71 F. Supp. at 636 ("[A] statute creating a claim against the Government should be strictly construed, and may not by implication be extended to cases not plainly within its terms." (internal quotation marks omitted)). Thus, § 2513 imposes a rigorous burden on those who seek a certificate of innocence.

Third, as every court to consider the question has held, "[t]he decision to deny a certificate of innocence is committed to the sound discretion of the district court." *Racing Servs.*, 580 F.3d at 713; *Betts*, 10 F.3d at 1283; *Rigsbee*, 204 F.2d at 72; *Eastridge v. United States*, 602 F. Supp. 2d 66, 69 (D.D.C. 2009); *Keegan*, 71 F. Supp. at 63536. Accordingly, we review a district court's denial of a certificate of innocence for abuse of discretion, *e.g.*, *Racing Servs.*, 580 F.3d at 711 12, and "must affirm [that] decision unless the court abused its discretion, or unless the findings underlying its decision were clearly erroneous." *Betts*, 10 F.3d at 1283. When a district judge has exercised his substantial discretion to deny a certificate of innocence, "we cannot require him to stultify himself by certifying an opinion contrary to his real conviction—no matter what our own view might be—except, perhaps, in a case in which the refusal to certify innocence was completely capricious and without rational basis." *Rigs bee*, 204 F.2d at 72; *see also Humphrey v. United States*, 52 Fed. Cl. 593, 597

(Fed. Cl. 2002) (noting the district court's "broad discretion in deciding whether or not to issue" a certificate of innocence), *aff'd*, 60 F. App'x 292 (Fed. Cir. 2003).

III.

Graham does not challenge any of the above principles. Indeed, he expressly concedes that the district court had discretion to determine his entitlement to a certificate of innocence, and that we "must affirm" absent abuse of this discretion or unless the "findings underlying" it "were clearly erroneous." Petr.'s Br. 4. Given our deferential review, how ever, even if we assume that the district court abused its discretion in finding Graham ineligible for a certificate of innocence under § 2513(a)(1) and the first clause of § 2513(a)(2),[3] Graham has not demonstrated that the court abused its discretion in concluding that he failed to meet his burden under the second clause of § 2513(a)(2), i.e. that "he did not by misconduct or neglect cause or bring about his own prosecution." We must therefore affirm the district court's denial of Graham's motion for a certificate of innocence.

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[3] It is not at all clear that the district court did abuse its discretion in relying on § 2513(a)(1) and the first clause of § 2513(a)(2). On direct appeal, we concluded only that the Government failed to prove Graham harbored the requisite intent. This may suggest that Graham's conviction was "re versed or set aside on the ground that he is not guilty of the offense of which he was convicted" and that he "did not commit any of the acts charged." 28 U.S.C. § 2513(a)(1), (2). But reversal based on "failure of proof beyond a reasonable doubt" also "leaves room for the possibility that the petitioner in fact committed the offense with which he was charged." *Betts*, 10 F.3d at 1284; *see also Racing Servs.*, 580 F.3d at 712; *Osborne*, 322 F.2d at 840; *Keegan*, 71 F. Supp. at 632, 63435.

Consistent with § 2513, the fact-finder designated by Congress — the district court —reviewed all the evidence relevant to Graham's conduct and state of mind, and found that Graham was "at the very least negligent" in failing to seek Board approval before obtaining cash for sick leave in 2004, and that this neglect brought about his prosecution. *Graham*, 595 F. Supp. 2d at 686. Ample record evidence supports that finding. Indeed, in his first appeal in our court, Graham expressly conceded that he "needed Board approval to cash out sick leave," Petr.'s Reply Br. in No. 074106, at 4 n.2, *available at* 2007 WL 1702675, and we noted that Graham's 2004 conversions of sick leave were inconsistent with both COA's written policies and the employment contract Graham prepared and executed. *Graham*, 269 F. App'x at 285 n.5, 286. The district court recited numerous other facts in its account of Graham's "sordid tale of abuse of a position of public trust," *Graham*, 595 F. Supp. 2d at 686, and did not abuse its discretion in concluding that they constituted "neglect" that provided cause for Graham's prosecution.

In fact, when Graham informed his lawyer in 2004 of his sick leave cash payments, his lawyer advised him that he could not legally cash in his sick leave, and recommended that he return the funds. J.A. in No. 074106, at 356. Although the attorney's conclusion proved inaccurate as a matter of law, *see Graham*, 269 F. App'x at 28687, it obviously constituted prudent and reasonable advice in light of the facts at hand. In contrast, Graham's marked lack of prudence—particularly his repeated failure to seek Board approval for substantial sick leave conversions that violated the terms of an employment contract he had prepared—supports the district court's finding that

Graham's neglect "brought about his own prosecution." These omissions, combined with substantial evidence of Graham's imprudent stewardship of COA, constitute a reasonable basis for Government officers to pros elute, leading them to conclude (as indeed the trier of fact did) that Graham committed a federal offense by stealing from his employer.

Graham relies heavily on the Seventh Circuit's opinion in *Betts*, the only court of appeals decision to find an abuse of discretion in a district court's denial of a certificate of innocence. *Compare Racing Servs.*, 580 F.3d at 714 (affirming denial of certificate of innocence), *Osborne*, 322 F.2d at 843 (same), *and Rigsbee*, 204 F.2d at 7273 (same), *with Betts*, 10 F.3d at 1286 (reversing denial of certificate); *see also Brunner*, 200 F.2d at 280 (reversing grant of certificate).[4]The court in *Betts* held that a petitioner fails to satisfy the second clause of § 2513(a)(2) only when he has "acted or failed to act in such a way as to mislead the authorities into thinking he had committed an offense." *Id.* at 1285. Although the *Betts* court acknowledged that "[n]either the statute nor the legislative history elucidates what kind of misconduct or neglect will bar relief, and [that] the case law is sparse," *id.* at 1284, the court concluded that Congress intended to preclude a certificate "'[w]here there has been an attempt to flee, a false confession, the removal

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[4] A casual reader might conclude from our analysis that federal courts of appeal have regularly had occasion to consider certificates of innocence. In fact, although Congress first enacted a certificate of innocence statute in 1938, *Keegan*, 71 F. Supp. at 626, this opinion cites to *all* published circuit court opinions interpreting § 2513 or its predecessors. *See Racing Servs.*, 580 F.3d 710; *Betts*, 10 F.3d 1278; *Osborne*, 322 F.2d 835; *Rigsbee*, 204 F.2d 70; *Brunner*, 200 F.2d 276.

of evidence, or an attempt to induce a witness or an expert to give false testimony or opinion, or an analogous attempt to suppress such testimony or opinion,'" *id.* at 1285 (quoting *Keegan*, 71 F. Supp. at 638).

We reject this narrow reading of subsection (a)(2) because it effectively reads "neglect" out of the statute. Each of the *Betts* court's enumerated examples implicates some element of *wrongful* intent. Indeed, the Seventh Circuit appears to limit denial on "neglect" grounds to situations in which "a defendant has it within his means to avoid prosecution but *elects* not to do so." *Id.* (emphasis added). Tellingly, the *Betts* court draws its examples of "neglect" from the discussion in *Keegan* of "willful misconduct," *see Keegan*, 71 F. Supp. at 638, not of conduct that constitutes "neglect" (or "negligence," the prior statutory term), which *Keegan* never addresses. Although *Betts* seeks to avoid a reading of § 2513 that "would require courts to assess the virtue of a petitioner's behavior even when it does not amount to a criminal offense," 10 F.3d at 1285, the statute's "misconduct or neglect" language on its face captures noncriminal conduct and thus requires just such an assessment.

Moreover, even if we did accept the *Betts* construction of § 2513, we could not conclude that the district court abused its discretion here. The court found that, given that the written contract did not permit the sick-leave-to-cash conversions and that Graham had obtained Board approval to modify the con tract in 2003, his failure to do so in 2004 at the very least constituted neglect and provided prosecutors a basis for charging that he intentionally stole from his employer. Graham's repeated failure to seek Board approval in

2004, while insufficient to establish guilt beyond a reasonable doubt, could reasonably be said to constitute "omission[s] by the petitioner that misle[d] the authorities as to his culpability." *Betts*, 10 F.3d at 1285.

Further, nothing in our opinion reversing Graham's conviction foreclosed the district court's finding that Graham's neglect caused his prosecution. Rather, we expressly cabined our reversal, holding only that "a reasonable trier of fact could not find, beyond a reasonable doubt, that Graham knowingly stole any money from COA." *Graham*, 269 F. App'x at 286. In reversing Graham's criminal conviction, we had no occasion to address the question of his "misconduct or neglect," but instead expressly limited our analysis to his claim of insufficient evidence. *See id.* at 287 n.7. The closest we came to a discussion of "misconduct or neglect" was to acknowledge the damning nature of some of the evidence against Graham, but to distinguish it from proof necessary for conviction. *Id.* at 285 n.5 ("[T]hese facts . . . are irrelevant so far as the district court's determination of guilt is concerned"). Our conclusion that "[i]n essence, the Board gave Graham the ability to cash out his accrued sick leave early without any limitation," *id.* at 286—which we reached in narrowly addressing the issue of criminal intent—left open the possibility that Graham nonetheless acted with neglect in failing to take the prudent, established course of seeking Board approval to circumvent express company policy.

What Graham refuses to recognize is that the Government's failure to offer sufficient evidence to prove his guilt does not require the district court, in considering the same evidence, to find him entitled to a certificate of innocence. *See, e.g.*, *Racing Servs.*, 580

F.3d at 712 ("A reversal of the criminal conviction based on insufficiency of the prosecution's evidence does not entitle the defendant to a certificate of innocence.") At trial, the Government had to prove, as a matter of fact, that Graham acted with a guilty state of mind, *e.g.* that he intended to steal from his employer. We have held that the Government failed to meet its burden of proof on this issue, and so reversed his conviction. But to obtain a certificate of innocence, Graham must address the same issue and prove, as a matter of fact, not only that he acted with no criminal intent but also that no "neglect" on his part caused his prosecution.

The district court exercised its discretion to conclude that Graham, who presented no evidence in support of his application, failed to prove this. We can discern nothing "completely capricious and without rational basis," *Rigsbee*, 204 F.2d at 72, in that conclusion. Although a reasonable trier of fact might disagree, the district court's finding was surely reason able in light of the record evidence.

In sum, the district court's painstaking, fact-intensive analysis of the evidence that had been admitted during Graham's five-day bench trial resulted in a conclusion consistent with § 2513, supported by the facts, and permitted (perhaps even suggested) by our earlier decision. *See Graham*, 269 F. App'x at 285 n.5. The district court, which acquitted Graham on 38 of 39 counts, expressly recognized the difference between "[b]ad conduct" and "criminal conduct." *Graham*, 2006 WL 2527613, at *5. And while we have held Graham's neglectful conduct irrelevant in determining his criminal guilt, § 2513 renders this evidence relevant, indeed critical, in determining his eligibility for a certificate of innocence. We find no abuse of discretion.

IV.

Before concluding, we must briefly respond to the dissent's contention that we have misread the second clause of § 2513(a)(2). Our friend in dissent maintains that this clause requires a petitioner to prove only that he did not cause his prosecution by "misconduct or neglect" that is "*separate*" from the charged conduct. (Dissent at 28 (emphasis added).)

The plain language of the statute forecloses this theory. Section 2513(a)(2) provides that in addition to proving that "[h]e did not commit any of the acts charged" or that those acts are not criminal, a petitioner must prove that "he did not by misconduct or neglect cause or bring about his own prosecution." 28 U.S.C. § 2513(a)(2). The statute does not in any way limit the type of causative "misconduct or neglect" that will bar relief. To make its argument then, the dissent must (and does) insert a modifier—"other," "additional," "subsequent," or "separate"—before "misconduct" in the second clause of § 2513(a)(2). (*See* Dissent at 23, 27, 28.) Thus, under the dissent's view, the statute would require a petitioner to prove only that "he did not by ["other" or "additional" or "subsequent" or "separate"] misconduct or neglect cause or bring about his own prosecution."[5] Congress

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[5] The dissent interprets a statute of its own creation. In addition to adding these words to § 2513(a)(2), the dissent repeatedly ignores other statutory language. Hence, the dissent asserts that one may somehow "elect" to be "neglect[ful]" (Dissent at 32), and that misconduct taking place once a prosecution "ha[s] already begun" can nonetheless "cause or bring about" that very prosecution (*id.* at 28). The dissent would rewrite the second clause of § 2513(a)(2) to bar relief only when, after a prosecution "ha[s] already begun," a petitioner commits intentional

could have so legislated. But it did not.

Rather, the plain language of the statute dictates that any "misconduct or neglect" that "cause[s] or bring[s] about" a petitioner's prosecution renders him ineligible for a certificate of innocence. In the face of the unambiguous words of the statute, we cannot construe § 2513(a)(2) to add language that Congress omitted. *See United States v. Deluxe Cleaners & Laundry, Inc.*, 511 F.2d 926, 929 (4th Cir. 1975) (noting that it is not "permissible to construe a statute on the basis of a mere surmise as to what the Legislature intended and to assume . . . that it failed to state something other than what it plainly stated" (internal quotation marks omitted)).

This is so particularly when the statute we interpret waives sovereign immunity. *See Middlebrooks v. Leavitt*, 525 F.3d 341, 347 (4th Cir. 2008) (noting that "waivers of sovereign immunity 'must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires'" (quoting *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992))). Indeed, the Supreme Court has directed that proper statutory construction "begins with the language of the statute," and when, as here, "the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks omitted).

Contrary to the dissent's suggestion, our decision to give effect to the plain language of the statute, and our refusal to add to or disregard any of its language, does

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misconduct that in and of itself furnishes probable cause for charges "separate" from that misconduct. (*See id.* at 28 & n.2.) Congress, however, has chosen a different path.

not "conflate[ ]" the first and second clauses of § 2513(a)(2) or render the first clause "incoherent or unnecessary." (Dissent at 2829.) The first clause requires a petitioner to prove that he did not commit the charged criminal acts or that they do not constitute a crime; the second clause requires him to prove that his mis conduct or neglect did not cause or bring about his prosecution. The first clause addresses criminal conduct; the second addresses acts of "misconduct or neglect." Therefore, the two clauses require a court to ask two distinct questions about the defendant's conduct. Even the dissent recognizes that a person may commit an act constituting misconduct or neglect without committing a crime. (*See id.* at 28 (listing examples).)[6]

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[6] The dissent's interpretation of § 2513(a)(2) also fails to account for the statute's purpose, to "compensate[ ] only the truly innocent," *Racing Servs.*, 580 F.3d at 712, by examining the petitioner's conduct and the prosecutors' charging decisions in light of the "entire record," *Brunner*, 200 F.2d at 280. To avoid confronting the statute's true purpose, the dis sent invents a new one, asserting that when Congress drafted the second clause of § 2513(a)(2), it wished to create "an estoppel defense that protects the United States Treasury against defendants who could have thwarted a prosecution that had already begun, but instead went to prison and then attempted to collect money damages." (Dissent at 27.) Not only is this asserted purpose completely unsupported by case law or legislative history, but it rests on the assumption that Congress's primary concern in drafting § 2513(a)(2) was that criminal defendants innocent of any crime would "elect" to face federal prosecution—and in fact would "elect" to go to prison—in the hopes that they could subsequently prove their innocence and then sue for damages. We are not aware of any criminal defendant who has attempted such a feat. Therefore, it seems extremely unlikely that Congress would create legislation to prevent recovery in such circum stances.

Nothing in § 2513(a)(2) (or in simple logic) requires the conclusion that a finding that a given act is not a crime man dates a finding that it does not constitute "misconduct or neglect." Rather, because only acts of "misconduct or neglect" that "cause or bring about" a petitioner's "own prosecution" disqualify him from relief, it seems likely that those acts often will have originally been charged as crimes, as they were here. In the dissent's view, however, only acts that do not garner criminal charges of their own (and yet somehow cause the levying of other charges) may prevent a petitioner from receiving compensation from the Government under the second clause of § 2513(a)(2). But an appellate court's holding that certain acts are not criminal surely does not eliminate the possibility that those acts nonetheless constitute "misconduct or neglect" that "cause[d]" the prosecution. Indeed, in *Keegan*, one of the first and most exhaustive interpretations of what is now § 2513, the court concluded that the petitioner did not qualify for a certificate of innocence in part because the very conduct for which he was charged "constitute[d] wil[l]ful misconduct which contributed to bring about his arrest and conviction." 71 F. Supp. at 640.

In sum, it is the dissent that offers a "novel interpretation" of § 2513, which if adopted would create a circuit split. (*See* Dissent at 23.) Although, as explained within, we disagree with the Seventh Circuit's cramped reading of the statute, neither that court nor any other has held that acts charged as crimes but ultimately found not to be criminal cannot constitute acts of misconduct or neglect causing the petitioner's prosecution. In fact, as noted above, even if we adopted the statutory construction of the *Betts* court, we would have to hold that the district court in

this case did not abuse its discretion in denying Graham a certificate of innocence. For even the *Betts* court concluded that the disqualifying misconduct or neglect need only constitute "an affirmative act or an omission by the petitioner that misleads the authorities as to his culpability." 10 F.3d at 1285. Graham's failure in 2004 to seek Board approval to modify his contract so as to convert sick leave to cash certainly constitutes such an act or "omission."[7]

V.

We of course regret that Graham suffered imprisonment for an unsupported conviction. However, Congress has deter mined that this unfortunate fact alone does not establish eligibility for damages against

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[7] Surprisingly, the dissent advances a broader definition of "neglect" that Graham has never advocated, perhaps because he recognizes that, if adopted, that definition would doom even a suggestion of recovery under § 2513. (*See* Dissent at 30 n.3 (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993) (defining "neglect" in another statute as "encompass[ing] both simple, faultless omissions to act and, more commonly, omissions caused by carelessness")).) For if "neglect" in § 2513 "encompasses . . . simple, faultless omissions to act," *Pioneer*, 507 U.S. at 388, as the dissent apparently believes, then it is obvious that the district court acted within its discretion in denying Graham a certificate based on his "faultless omissions" in failing to seek Board approval in 2004. The district court did not adopt this broad definition of "neglect." Instead, the court equated "neglect" with "negligence"—perhaps relying on the fact that Congress originally used the term "negligence" in the statute, and replaced it with "neglect" only to "clarify ambiguities." *See* Revisor's Notes, 28 U.S.C. § 2513. Because the definition of "neglect" the court adopted is *more favorable* to petitioners like Graham than the definition the dissent prefers, it is no wonder that Graham does not ask us to find error in the district court's definition of "neglect."

the Government. Rather, § 2513 vests the court that heard the evidence at trial with the discretion to ascertain not just whether a defendant is not guilty, but whether he is in fact entitled to a certificate of innocence. Because the district court did not abuse that discretion, we must affirm.

AFFIRMED

GREGORY, Circuit Judge, dissenting:

Both the district court and the majority misconstrue § 2513, imposing a standard of their own design in place of what is required by the statute. Congress made clear that in order to recover under § 2513, a petitioner must prove that the *charged acts* did not constitute a crime. Separately, a petitioner must prove that he did not cause his own prosecution through some other misconduct or neglect. The majority errs by conflating these two elements, requiring a petitioner to show not only that the charged acts were not criminal *but also* that those acts conform to some amorphous, unwritten code of conduct. Today, through its novel interpretation of the statute, the majority creates a circuit split and encourages the government to prosecute acts it deems "immoral" rather than acts that are criminal under the law.

I.

In order to obtain a certificate of innocence and collect money damages for wrongful imprisonment, a petitioner must satisfy three requirements under 28 U.S.C. § 2513. He must prove: 1) "the record . . . of the court setting aside or reversing such conviction" establishes that "his conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted," § 2513(a)(1); 2) either "he did not commit any of the acts charged" *or* "his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia," § 2513(a)(2); and 3) "he did not by misconduct or neglect cause or bring about his own prosecution," § 2513(a)(2).

The majority relies on the substantial discretion afforded to the district court in determining whether or not a petitioner has successfully met his burden under the statute. *See* Maj. Op. at 2, 1314. However, this case cannot rest on the district court's discretion because the district court's failure to correctly apply the statute is an error of law, which is necessarily an abuse of discretion. *See Thorn v. Jefferson Pilot Life Ins. Co.*, 445 F.3d 311, 317 (4th Cir. 2006). Under the majority's reading, a person who has met the standard set forth in § 2513(a)(1) must not only show that they are truly innocent under the first prong of § 2513(a)(2), but additionally that the same, noncriminal conduct does not constitute negligence under the second prong of § 2513(a)(2). Inserting this extraneous impediment into the statute is unwarranted and unsupported by the law. I therefore would reverse the district court and remand with instructions to grant the certificate of innocence.

A.

7The first two requirements under the statute, § 2513(a)(1) and the first prong of § 2513(a)(2), evince Congress' intent to compensate only those who are "truly innocent," both of the charges for which they were convicted and any other crime which their conduct could constitute. *See Betts v. United States*, 10 F.3d 1278, 1284 (7th Cir. 1993) (citing *Burgess v. United States*, 20 Cl.Ct. 701, 704 (1990) ("Consequently, it would be necessary to separate from the group of persons whose convictions have been reversed, those few who are in fact innocent of any offense whatever.") (citation omitted).

The majority first contends that it is "unclear" if Graham met his burden to prove his actual innocence under § 2513(a)(1) and the first prong of § 2513(a)(2), asserting that this Court merely held that "the Government failed to prove Graham harbored the requisite intent," and therefore reversed his conviction based on insufficiency of the evidence. Maj. Op. at 14 n.3. However, we made plain in reversing Graham's conviction that no crime was committed. *United States v. Graham*, 269 F. App'x 281, 286 (4th Cir. 2007).

In overturning his conviction, we held that Graham was not required to return to the Board for permission to convert his sick leave to cash. *See id.* at 286 ("Quite simply, Graham's cashouts in June and July of 2003 and January and February of 2004 were not contrary to the authority given to him by the Board."). The majority makes much of the fact that Graham failed to seek the Board's permission in light of the limitations his employment contract placed on his ability to convert sick leave to cash. Per the terms of his contract, he was only allowed such a payout only upon

illness or termination. However, we explicitly acknowledged those contractual conditions and held that "the Board's decisions in January, March, and May of 2003 resulted in *a de facto amendment that overrode these restrictions*." *Id.* (emphasis added). Graham's employment contract term was thus altered by the party empowered to do so — the Board. Our decision reversing Graham's conviction was therefore not based on some technicality or procedural issue, but rather on finding Graham "truly innocent" of the crime for which he was convicted. "[T]he record of . . . the court reversing" Graham's conviction thus demonstrates that the "conviction has been reversed or set aside on the ground that [Graham] is not guilty of the offense of which he was convicted," as is mandated by § 2513(a)(1).

Additionally, in no way does the record below support the inference that Graham was guilty of some other, unindicted crime, as is prohibited by § 2513(a)(2). Instead, it is clear that the government pursued every possible charge against Graham. Graham's indictment contained thirty-nine counts, only one of which resulted in a conviction. Although the majority points to the district court's recitation of "Graham's 'sordid tale of abuse of a position of public trust,'" Maj. Op. at 15 (citing *United States v. Graham*, 595 F. Supp. 2d 681, 686), none of that behavior was found to be illegal or even evidence of some further crime of which the government was unable to obtain proof. *Compare*, *United States v. Keegan*, 71 F. Supp. 623, 63334, 635, 639 (S.D.N.Y. 1947) (holding that denial of a certificate of innocence is appropriate in cases "where the indictment may fail on the original count, but claimant may yet be guilty of another or minor offense"). It is indisputable that Graham's conduct "constituted no

offense against the United States, or any State, Territory or the District of Columbia," as is required under § 2513(a)(2).

Because Graham's conviction was not overturned on procedural grounds, and nothing in the record indicates that the conduct for which Graham was acquitted somehow constitutes a different crime against the United States, Graham clearly met his burden under both § 2513(a)(1) and the first clause of § 2513(a)(2) to show that he was truly innocent.

B.

Beyond the initial question of whether a petitioner is truly innocent, the final clause of § 2513(a)(2) requires a petitioner to show "he did not by misconduct or neglect *cause* or *bring about his own prosecution*." 28 U.S.C. § 2513(a)(2) (emphasis added). "The statute expressly requires a *causal connection* between the petitioner's conduct and his prosecution; it does not preclude relief simply because the petitioner engaged in misconduct or neglect period." *Betts*, 10 F.3d at 1285 (emphasis added). It must follow that to give meaning to all words in the statute, one cannot "cause" one's own prosecution by engaging in the very conduct which was found to be noncriminal in the first part of the inquiry. Instead, the second prong of the statute must be referring to some *additional* conduct, be it intentional or unintentional, willful or neglect ful, which misleads the authorities into continuing their investigation of, and ultimately prosecuting, a person later cleared of criminal wrongdoing. To say otherwise conflates the "acts, deeds, or omissions in connection with [the] charge" referenced in the first clause of § 2513(a)(2) and the "misconduct or neglect" required in the second clause.

Congress made clear that the two inquiries are fundamentally different. A petitioner must show that the underlying conduct for which he was charged was "no offense against the United States, or any State, Territory, or the District of Columbia." § 2513(a)(2). In other words, the only thing that a petitioner must prove regarding his underlying conduct is that *it was not a crime*. The second clause of § 2513(a)(2) requires the petitioner show that no other, subsequent conduct during the course of the government's investigation induced the government to commence a wrongful prosecution. *Id.* Essentially, the "misconduct or neglect" prong is an estoppel defense that protects the United States Treasury against defendants who could have thwarted a prosecution that had already begun, but instead went to prison and then attempted to col lect money damages.[1]

Any other reading of the statute would be nonsensical. Why would Congress explicitly specify that a petitioner need only prove that the "acts, deeds, or omissions" for which he was charged "constituted no offense against the United States," only to further require in the next

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[1] The majority's reading of my view in dissent continues to ignore the fact that the statute requires a petitioner to show that his "misconduct or neglect" did not *cause* his prosecution. In zeroing in on the first clause of § 2513(a)(2), the majority repeatedly asserts that "Graham's failure in 2004 to seek Board approval to modify his contract so as to convert sick leave to cash certainly constitutes . . . an act or 'omission.'" Maj. Op. at 22. One can certainly speculate as to whether or not Graham's conduct at COA constituted "misconduct or neglect." But the statute requires some thing more: a *causal link* between those actions and the prosecution at issue. Neither the district court nor the majority has or can point to how Graham's conduct, for which he was charged and ultimately acquitted, *caused* his prosecution.

clause proof that those same acts were not an offense against any private entity, public decorum or social mores? If Congress intended this result, surely it would not have limited a petitioner's burden regarding the charged acts to offenses against the State; instead it would have remained silent or at minimum broadened the offenses to include more than actual crimes. But it did not do so. Instead, the statute clearly demarcates the sphere of charged acts as separate from the "misconduct or neglect" which "cause or bring about . . . [the] prosecution."[2] Thus, a petitioner could cause his own prosecution by giving a false confession, removing evidence, or by failing to disclose clearly exculpatory evidence within his possession, either intentionally or carelessly. Though this list is not exhaustive, it certainly encompasses conduct which constitutes misconduct and neglect, which, under § 2513(a)(2), could cause the petitioner's prosecution.

Rather than recognize the separate nature of the two prongs of § 2513(a)(2), the majority conflates the two and affirms the district court's finding that "Graham was 'at the very least *negligent*' in failing to seek Board approval before obtaining cash for sick leave in 2004, and that *this neglect* brought about his prosecution." Maj. Op. at 14 (citing *Graham*, 595 F. Supp. 2d at 686) (emphasis added). In equating "neglect" with

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[2] It is important to distinguish between conduct that could cause a government *investigation* and that which would cause a *prosecution*. Improper corporate stewardship could be grounds for government investigation to determine whether or not a crime has been committed. It would not be reasonable, however, to prosecute unless the government had probable cause to believe that the defendant's conduct satisfied all of the elements of the crime. This is another example of the majority's failure to analyze the words actually used by Congress in the statute.

"negligence" and then applying it to the charged conduct, the majority renders the first clause of § 2513(a)(2) incoherent or unnecessary, thereby violating a basic cannon of statutory construction. *See Corley v. United States*, 129 S. Ct. 1558, 1566 (2009) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (citation omitted)). As stated above, if Congress intended for district courts to re evaluate the charged conduct under a *lower standard of culpability*, it would not have limited the charged conduct to offenses against the State, nor would it have distinguished the acts associated with the charged conduct from the "misconduct or neglect" that "causes or brings about" the prosecution. It is a distortion of the statute to hold that the very act which was found to be "no offense against the United States" could mislead the government into prosecuting a defendant and thereby preclude recovery. If "charged conduct" and "misconduct and neglect" are really interchangeable as the majority's reading requires, then there is no foreseeable scenario in which someone wrongfully imprisoned could recover. After all, even a person prosecuted for simply being at the wrong place at the wrong time could easily be said to have been at the wrong place through his own "neglect."

The majority rejects the Seventh Circuit's decision in *Betts v. United States*, which also holds that the "misconduct and neglect" prong does not apply to the charged conduct, but rather requires some additional conduct which "mislead[s] the authorities into thinking [petitioner] had committed an offense." 10 F.3d at 1285. The majority's only basis for doing so is that "this narrow reading of subsection (a)(2) . . . effectively

reads 'neglect' out of the statute." Op. at 16. Instead, it asserts that the "statute's 'misconduct or neglect' language on its face captures noncriminal conduct" and therefore the charged conduct should be reassessed under a negligence standard. *Id.* at 17. Yet, what the majority fails to recognize in summarily dismissing the reasoning of the one circuit that has specifically interpreted the second clause of § 2513(a)(2) is that *Betts* specifically accounts for both affirmative misconduct and careless omissions.[3] *Betts*, 10 F.3d at 1285 (holding that petitioner must have "acted or failed to act in such a way as to mislead the authorities into thinking he had committed an

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[3] When Congress uses "neglect" without otherwise specifying, it means "carelessness." *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'Ship*, 507 U.S. 380, 388 (1993) ("The word therefore encompasses both simple, faultless omissions to act and, more commonly, omissions caused by care lessness."). The majority reads neglect out of the statute and replaces it with "negligence." It must do so in order to maintain that the "misconduct or neglect" prong refers to the same conduct as the "acts charged" prong, while at the same time reading the statute to allow recovery for a person charged with completely nonculpable conduct, i.e., simple carelessness. The majority can only have it both ways by replacing the word actually used by Congress with a word that it would prefer. The much easier reading of the statute, and the one that gives Congress' intended effect to the word "neglect," is to read the "acts charged" and "misconduct or neglect" prongs separately. Under this reading, an individual prosecuted for the crime of simple carelessness, even though there is not and has never been a crime of simple carelessness, could rightfully recover for wrongful prosecution. On the other hand, the individual wrongfully prosecuted for a crime he truly did not commit, but who nonetheless carelessly fails to turn over exculpatory evidence in his possession, would be barred from recovery. This application gives meaning to every word in the statute and is consistent with the array of estoppel defenses available in the law.

offense"). Thus, contrary to the majority's assertion, the Seventh Circuit interpreted the statute in its entirety and gave the statute its most natural reading.[4]

The majority's strained statutory construction imputes to Congress a vision of government power that is anathema to the rule of law. Consider the statement that "Graham's imprudent stewardship of COA, constitute[s] a reasonable basis for Government officers to prosecute," Maj. Op. at 15, regardless of the fact that being a "subpar" executive is clearly not criminal.[5]

The district court described Graham's misconduct as including:

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[4] Even if we were to assume arguendo that neglect somehow constitutes negligence, Graham's failure to seek Board approval for converting sick leave to cash cannot be considered negligent when there was no duty breached. The majority did not even define the standards under which it measured Graham's alleged negligent conduct. In order for a cause of action to lie in negligence, the proponent must show there was a duty of care owed. In reversing Graham's conviction, we held that Graham was not required to return to the Board to obtain permission to cashout his sick leave, *see Graham*, 269 F. App'x at 286, and therefore had no duty to return and get permission. Thus, even under the majority's own reading of the statute, Graham would have met the requirements and should have been issued a certificate of innocence.

[5] Again, conduct which is not criminal, but leads to a government investigation, is categorically different from conduct which *causes* one's prosecution.

> Graham operated [COA and All Care] for years as his own personal domain and for the financial bene fit of himself and his family. His $185,000 annual salary, excessive by comparison to the pay of others in similar positions, was supplemented by the generous cashout of sick leave Graham arranged for himself. . . . Graham used employees on company time to perform personal services for himself and his family; bought at least one expensive item, a $6,000 television, through COA to get a better price and avoid sales taxes; manipulated a SEP IRA to benefit his family; and assumed a lavish lifestyle including regular visits to a "gentlemen's club." "Bailey," a dancer at Graham's favorite club, on whom he lavished gifts and money, inquired where his money came from.

Graham, 595 F. Supp. at 685. The majority repeats this recitation at page eleven of its opinion. Clearly both the district court and the majority are offended by this conduct. However, being overpaid, living a lavish lifestyle, and frequenting strip clubs, for better or worse, are not crimes in this country.

Only probable cause to believe that a person committed acts that satisfy the elements of a crime gives the government reasonable basis to prosecute. The enduring principles on which our government was founded make it clear that the government does not have a reasonable basis to prosecute a person engaged in immoral or "bad conduct" if that conduct does not satisfy the elements of a crime. It is dangerous to suggest that any time a person's conduct offends the sensibilities of three judges or society at large, the government is privileged to incarcerate him. And it

strains credulity to suggest that the United States Congress intended a statute to be construed as such.

The purpose of § 2513 is to limit compensation for unjust imprisonment to those who are truly innocent and to estopp those who elect not to avoid prosecution, by their actions or omissions, from relief. In light of the error of law committed by the district court in interpreting § 2513, I would reverse and remand with instructions to grant the certificate of innocence. Thus, I respectfully dissent

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT BECKLEY

UNITED STATES OF AMERICA

v. CRIMINAL NO. 5:06-00025

ROBERT E. GRAHAM

ORDER

Pending before the court is defendant's motion for a certificate of innocence. For reasons explained in a memorandum opinion to be filed forthwith, that motion is DENIED.

The Clerk is DIRECTED to send a copy of this Order to all

counsel of record.

IT IS SO ORDERED this 17th day of December, 2008.

ENTER:

David A. Faber

United States District Judge.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA

v. CRIMINAL NO. 5:06-00025

ROBERT E. GRAHAM

595 F. Supp. 2d 681; 2008 U.S. Dist. LEXIS 106944

December 19, 2008, Decided

SUBSEQUENT HISTORY: Affirmed by *United States v. Graham, 2010 U.S. App. LEXIS 12316 (4th Cir. W. Va., June 16, 2010)*

PRIOR HISTORY: *United States v. Graham, 269 Fed. Appx. 281, 2008 U.S. App. LEXIS 5397 (4th Cir. W. Va., 2008)*

COUNSEL: For Robert E. Graham, Defendant (1): Harry P. Henshaw, III, LEAD ATTORNEY, THE LAW OFFICE OF HARRY P. HENSHAW III, Charleston, WV; John A. Kessler, Michael W. Carey, LEAD ATTORNEYS, CAREY SCOTT & DOUGLAS, Charleston, WV.

For State of West Virginia, Interested Party: Silas B. Taylor, OFFICE OF THE ATTORNEY GENERAL, Charleston, WV.

For United States of America, Plaintiff: Hunter P. Smith, Jr., LEAD ATTORNEY, Gary L. Call, U. S. ATTORNEY'S OFFICE, Charleston, WV.

JUDGES: David A. Faber, United States District Judge.

OPINION

MEMORANDUM OPINION

By Order entered December 17, 2008, the court denied the motion of Robert E. Graham ("Graham") for a Certificate of Innocence under *28 U.S.C. § 2513*. The reasons for that decision follow.

I. *Statement of the Case*

On July 18, 2006, a federal grand jury returned a second superseding indictment charging Graham in 39 counts with various offenses involving federal program fraud. Graham pleaded not guilty to all of the charges and waived his right to a jury trial. From July 24, 2006, through July 28, 2006, the court conducted a bench trial of all of the charges against Graham. On August 30, 2006, the court found Graham guilty as to Count 14, which charged him with stealing $ 31,129 from his employer, the Council on Aging, Inc. ("COA"), by cashing out sick leave in violation of his employment contract and *18 U.S.C. § 666*. He was found not guilty on all other charges. The court sentenced Graham to 24 months imprisonment, three years of supervised release, a fine of $ 10,000, a special assessment of $ 100, and a forfeiture of $ 31,129.

Graham's relevant employment contract as Executive Director of COA and its sister corporation, All Care Home and Community Services, Inc. ("All Care"), contained the following provision concerning sick leave:

> SICK LEAVE/PERSONAL BUSINESS: From the date of employment sometime around May 1975 till the termination of employment,

> Employee shall be entitled to one day per month of accumulating Sick Leave, beginning on the first date of Employee's employment. Sick leave may be accumulated and carried over from year to year. Sick leave benefits may be converted into cash compensation if used for illnesses or upon the termination of this contract.

Despite the fact that the contract permitted cash out of sick leave under only two circumstances -- illness or termination -- Graham requested and received permission from his Board of Directors to cash out some of his sick leave in 2003. In 2004, he again cashed out sick leave, this time without seeking approval of his directors. The 2004 cash out was the subject of Count 14, the offense on which Graham was convicted at trial. In determining to find Graham guilty of Count 14, this court reasoned as follows:

[T]he conclusion is inescapable that Graham cashed in the sick leave without the approval of his board, knowing he needed board approval, thereby effectively stealing the money or converting it to his own use. From the evidence taken at trial it is clear that defendant, an employee, took this money from COA without having any board approval whatsoever. These transactions each constituted major changes of the sort that required board approval. The fact that Graham sought board approval for the earlier cash-outs of sick leave is compelling evidence that he knew such approval was required. Memorandum Opinion of August 30, 2006, at 11.

Concluding that no reasonable trier of fact could have found Graham guilty beyond a reasonable doubt on such evidence, the Court of Appeals reversed Graham's conviction and directed this court to enter a judgment

of not guilty as to Count 14. Unfortunately, by that time Graham had served a portion of his term of incarceration -- some 13 months in prison.

Contending he was unjustly convicted of an offense against the United States and imprisoned, Graham has filed a claim for compensation in the United States Court of Federal Claims pursuant to *28 U.S.C. §§ 1495* and *2513*. He moves this court for a Certificate of Innocence, a necessary prerequisite to the relief he seeks in the Court of Claims.[1]

II. *The Legal Standard*

28 U.S.C. § 1495 confers jurisdiction on the Court of Federal Claims over "any claim for damages by any person unjustly convicted of an offense against the United States and imprisoned." That statute must be read in conjunction with *28 U.S.C. § 2513*, which provides:

> (a) Any person suing under *section 1495* of this title must allege and prove that:
>
> > (1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned

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[1] Graham originally filed his motion for a Certificate of Innocence with the United States Court of Appeals for the Fourth Circuit. That court dismissed his motion without prejudice, holding that the trial court was the appropriate forum to issue such a certificate.

> upon the stated ground of innocence and unjust conviction and
>
> (2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.
>
> (b) Proof of the requisite facts shall be by a certificate of the court or pardon wherein such facts are alleged to appear, and other evidence thereof shall not be received.
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> * * *
>
> (e) The amount of damages awarded shall not exceed $ 100,000 for each 12-month period of incarceration for any plaintiff who was unjustly sentenced to death and $ 50,000 for each 12-month period of incarceration for any other plaintiff.

Whether or not an applicant is entitled to a certificate of innocence is a question committed to the sound discretion of the trial court and the ultimate exoneration of the applicant does not make it mandatory that the certificate be issued. *Betts v. United States, 10 F.3d 1278, 1283-84 (7th Cir. 1993)*; *Rigsbee v. United States, 92 U.S. App. D.C. 244, 204 F.2d 70, 72 and n. 2 (D.C. Cir. 1953).*

Section 2513 does not mandate the payment of public funds to everyone who has spent time in custody and been ultimately acquitted. It does something quite different -- it orders compensation to the truly

innocent who have been prosecuted through no fault of their own. What is contemplated is the compensation of victims of prosecutorial overreach. The fundamental proposition underlying the statute is this -- there is a difference between someone who is legitimately prosecuted and ultimately found not guilty and one who is wrongfully prosecuted when truly innocent. The statute is designed to compensate the latter; it has nothing to say about the former. If every incarcerated person who was acquitted at trial or whose conviction was reversed on appeal were entitled to compensation there would have been no reason for Congress to include the certificate of innocence procedure in the statutory scheme. It could have simply allowed a claim to be supported by the order of acquittal or reversal on appeal.

Additionally, the statute inverts the burden of proof; the claimant must prove his own actual innocence and he must do so to the satisfaction of the judge who heard the evidence at trial. Moreover, he must not only show his own actual innocence, he must demonstrate that he did nothing by misconduct, or even by *neglect*, to bring about his own prosecution. In short, Congress clearly intended to provide compensation only to innocent persons who can prove that they have been unjustly prosecuted through no fault of their own.

There are few reported cases that discuss *§ 2513*. The paucity of case law under the statute suggests that it is a remedy that is rarely pursued successfully. It is rarely used, this court believes, because few applicants can satisfy its rigorous standard.

The cases we do have show clearly that *§ 2513* provides a remedy to be applied only in exceptional cases. Discussing an earlier version of *§ 2513*, the

court in *United States v. Keegan, 71 F.Supp. 623, 628 (S.D.N.Y. 1947)*, recounted at length its legislative history and noted that the cases in which relief can be claimed are limited to those in which "the claimant shall affirmatively prove his innocence. Hence only a most flagrant case of injustice could be brought within the terms of this section." The court concluded that from the legislative history "it will clearly appear that Congress never intended that every imprisoned person whose conviction had been set aside, should be indemnified by the Government." *Id. at 635*. The court in *Keegan* observed that wide discretion in granting or withholding the certificate is vested in the trial court and that the certificate should not be issued unless that court "is satisfied from the record before it that petitioner is altogether innocent." *Id. at 636*. The court must "separate from the group of persons whose convictions have been reversed, those few who are in fact innocent of any offense whatsoever." *Id. at 632*.

III. *Graham's Own Misconduct*

COA and All Care operated out of Itmann, Wyoming County, West Virginia, as not-for-profit corporations under the Internal Revenue Code, *26 U.S.C. § 501(c)(3)*. COA provided nutritional care, transportation, medical, employment and other services to the senior citizens of Wyoming County and surrounding areas. COA received funding from Medicaid, the State of West Virginia and the United States Department of Labor. All Care also provided services to the elderly and the disabled, and received the majority of its funding from Medicaid.

Graham was the Executive Director of COA beginning in 1979 and of All Care beginning in 1984. Prior to December 2001, he did not have a written contract

with either COA or All Care. In December 2001, he signed similar employment contracts with both. Prior to December 2001, Graham received a total salary from COA and All Care of $ 125,000. In 2001 his combined salary was increased to $ 185,000. His contract, which Graham prepared, was for a term of 20 years, provided for renewal at Graham's option, and contained a provision that he could not be terminated without his consent.

In March 2002, the costs of operation of All Care were assumed by COA due to changes in Medicaid reimbursement. A new employment contract was executed by the defendant and COA on March 28, 2002. Under the new contract, COA assumed all responsibility for payment of the defendant's $ 185,000 salary and sick leave. Graham was working under this contract at the time of the instant offense. In regard to sick leave, the new contract was changed to state,

SICK LEAVE/PERSONAL BUSINESS. Beginning on the date of employment sometime around May 1975 until the termination of employment, Employee shall be entitled to accrue two days (16 hours) per month paid sick leave time. Sick Leave may be accumulated from year to year. Sick leave benefits may be converted into cash compensation if used for illnesses or upon the termination of this contract.

Under the contracts, Graham agreed to perform faithfully, industriously, and to the best of his ability, experience and talents all the duties required of him.

Graham selected and controlled the Boards of Directors of COA and All Care which were composed entirely of the elderly. At the time the initial employment contract was entered in December 2001, the COA Board of Directors' president was Maxine

Toliver, now deceased, who was then 82 years old. Other board members included Hazel Morgan, age 79; Hazel Lusk, age 86; Joan Flaim, now deceased, then age 87; Edith Shields, now deceased, then age 87; Charlene Vance, age 71; Georgia Hatfield, age 77; and Martha McKinney, age 77.

Although COA and All Care were tax exempt non-profit corporations funded by tax dollars, Graham operated them for years as his own personal domain and for the financial benefit of himself and his family. His $ 185,000 annual salary, excessive by comparison to the pay of others in similar positions, was supplemented by the generous cash-out of sick leave Graham arranged for himself. The evidence at trial established that Graham used employees on company time to perform personal services for himself and his family; bought at least one expensive item, a $6,000 television, through COA to get a better price and avoid sales taxes; manipulated a SEP IRA to benefit his family; and assumed a lavish lifestyle including regular visits to a "gentlemen's club." "Bailey," a dancer at Graham's favorite club, on whom he lavished gifts and money, inquired where his money came from. Graham told her "that he owned Council on Aging and he had built this company up and that's where the money was coming from . . . ." Trial Transcript, July 24, 2006, p. 228.

Graham's story is a sordid tale of abuse of a position of public trust for his own personal benefit. This court finds shocking the lack of governmental oversight that permitted such abuse to occur and does not fault the United States Attorney for his prosecution of Graham, a welcome deterrent to similar conduct by others.

The evidence against Graham, while insufficient to prove his guilt beyond a reasonable doubt, certainly shows that, in a general sense, he brought about his own prosecution. Specifically, with regard to the count upon which he was convicted at trial, Graham was at the very least negligent. It would have been a simple matter for Graham to seek board approval for cash out of sick leave relevant to this count. He either simply neglected to do so or he purposely failed to do so for some specific reason such as the belief his request would not be approved. In either event his own conduct brought about his prosecution on the count of conviction.

Accordingly, this court is unable to reach either of the conclusions mandated by *28 U.S.C. § 2513*. It is not persuaded that Graham is in fact innocent, nor can it conclude that he did not by misconduct or neglect bring about his own prosecution.

The Court of Appeals carefully reviewed the evidence against Graham on the count of conviction and concluded that it was insufficient to establish his guilt beyond a reasonable doubt. A finding on appeal that the evidence adduced at trial is insufficient to support a conviction beyond a reasonable doubt is not a legitimate basis for granting a certificate of innocence. *See, e.g., Finley v. United States, 2008 U.S. Dist. LEXIS 107006, 2008 WL 2561594, *2 (E.D. Cal. 2008).*

IV. *Conclusion*

Having conducted the analysis required of the trial court under *28 U.S.C. § 2513*, the court for the reasons discussed above has concluded that Graham's motion for a certificate of innocence must be denied. An Order has been entered to that effect and sent to counsel.

The Clerk is DIRECTED to send a copy of this Memorandum Opinion to all counsel of record.

IT IS SO ORDERED this 19th day of December, 2008.

/s/ David A. Faber

David A. Faber

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA
BECKLEY

UNITED STATES OF AMERICA

v. CRIMINAL NO. 5:06-00025

ROBERT E. GRAHAM

RESPONSE OF THE UNITED STATES TO
MOTION FOR A CERTIFICATE OF INNOCENCE

Comes now the United States of America, by Hunter P. Smith Jr., Assistant United States Attorney for the Southern District of West Virginia, in response to defendant's Motion for Certificate of Innocence.

The United States does not oppose this motion.

Respectfully submitted,
CHARLES T. MILLER
United States Attorney
s/Hunter P. Smith Jr.
HUNTER P. SMITH JR.
WV Bar No. 3467
Assistant U.S. Attorney
P.O. Box 1713

Charleston, WV 25326
Telephone: (304) 345-2200

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing "Response of the United States to Motion for a Certificate of Innocence" has been electronically filed and service has been made on opposing counsel by virtue of such electronic filing this the 2nd day of December 2008, to:

Harry P. Henshaw, III, Esquire
Suite 1204, Chase Tower
707 Virginia Street, East
Charleston, WV 25301
henshaw@ntelos.net

Silas B. Taylor
Senior Deputy Attorney General
Office of the Attorney General
State Capitol, Room #26
Charleston, WV 25305

s/Hunter P. Smith Jr.
HUNTER P. SMITH JR.
WV Bar No. 3467
Assistant U.S. Attorney
P.O. Box 1713
Charleston, WV 25326
Telephone: (304) 345-2200
Fax: (304) 347-5104
E-mail: hunter.smith@usdoj.gov

FILED: November 19, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-4106 (L)
(5:06-cr-00025)

UNITED STATES OF AMERICA,
Plaintiff - Appellee

v.

ROBERT E. GRAHAM,
Defendant - Appellant

and

STATE OF WEST VIRGINIA,
Party-in-Interest

O R D E R

This Court's reversal of appellant's conviction was not based on technical or procedural grounds, but law and fact; therefore, a certificate of innocence is appropriate in accordance with 28 U.S.C. § 2513. Nonetheless, the district court is the most appropriate court to issue the certificate.

Accordingly, the motion for certificate of innocence is dismissed without prejudice. Entered at the direction of Judge Gregory with the concurrence of Judge Michael and Judge Bailey.

For the Court

/s/ Patricia S. Connor, Clerk

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

December 5, 2007, Argued

March 13, 2008, Decided

UNITED STATES OF AMERICA,

Plaintiff Appellee,

v.

ROBERT E. GRAHAM,

Defendant -Appellant,

and

STATE OF WEST VIRGINIA,

Party-in-Interest.

JUDGES: Before MICHAEL and GREGORY, Circuit Judges, and John Preston BAILEY, United States District Judge for the Northern District of West Virginia, sitting by designation.

OPINION

PER CURIAM:

After a bench trial, the appellant, Robert E. Graham ("Graham") was convicted of stealing $31,129 from his

employer, the Council on Aging, Inc. ("COA"), an agency receiving federal funds, in violation of *18 U.S.C. § 666(a)(1)(A)*.[1] Graham appeals the district court's judgment, contending that (1) there is not substantial evidence to support his conviction, (2) the district court clearly erred in considering conduct for which Graham was acquitted as "relevant conduct" for sentencing purposes, and (3) the district court improperly ordered forfeiture. After a thorough review of the evidence, we reverse Graham's conviction.

I.

The facts underlying this dispute are undisputed. For over two decades, Graham was the Executive Director of two nonprofit organizations, COA and All Care Home and Community Services, Inc., ("All Care"). The organizations worked together to identify and provide services reimbursed by state and federal programs, including Medicaid, to qualified recipients. Both COA and All Care shared the same Board of Directors ("the Board"). Prior to the Board's quarterly meetings, Graham would send each board member a packet of

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[1] 1(a) Whoever, if the circumstance described in subsection (b) of this section exists-- (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof-- (A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that-- (i) is valued at $ 5,000 or more, and (ii) is owned by, or is under the care, custody, or control of such organization, government, or agency... shall be fined under this title, imprisoned not more than 10 years, or both. (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives in any one year period, benefits in excess in $ 10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

documents that included an agenda for the meeting, the minutes from the previous board meeting, check registers, program reports and "Director's Notes." Graham wrote the "Director's Notes" and the minutes from each meeting. [2]

Until 2001, Graham did not have a written contract with either COA or All Care. This changed in December 2001, when Graham provided the Board with two essentially identical employment contracts for himself, one for each agency ("twin contracts"). The Board president signed both contracts. For purposes of this case, the relevant provision in each of the twin contracts concerned Graham's sick leave:

SICK LEAVE/PERSONAL BUSINESS: From the date of employment sometime around May 1975 till the termination of employment, Employee shall be entitled to one day per month of accumulating Sick Leave, beginning on the first date of Employee's employment. Sick leave may be accumulated and carried over from year to year. Sick leave benefits may be converted into cash compensation if used for illnesses or upon the termination of this contract.

(J.A. 955, 961.) In March 2002, Graham prepared an amended contract between himself and COA that consolidated the twin contracts into one. The Board president signed the consolidated contract. In essence, the terms of the consolidated contract provided Graham with the same cumulative benefits he received under the twin contract framework. For example, the consolidated contract combined Graham's salaries and sick leave from the twin contracts. The sick leave

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[2] Occasionally, there was another person at the meeting who would take minutes as well.

provision in the consolidated contract, like the previous twin contracts, only allowed Graham to cash out his sick leave under two circumstances: illness or termination. (J.A. 977.)

In preparation for the January 27, 2003, Board meeting, Graham sent out "Director's Notes" in which he wrote, in part:

I am requesting to buy out some of my sick leave. It shows in the books as an accrual. I can already but [sic] out my vacation.

(J.A. 1001.) The minutes from that Board meeting stated that the Board unanimously approved Graham's request to "buy accrued leave." (J.A. 1003.) On the same day, Graham cashed out 1200 hours of accrued sick leave which totaled $ 106,728 (gross) and $ 56,953.16 (net). (J.A. 1005-1110.)

Subsequently, Graham's Director's Notes for the next two board meetings on March 27, 2003, and May 14, 2003, included the following identical request to continue buying out his accrued leave: I am requesting permission to continuing [sic] buying out my vacation/annual and sick leave. It shows in the books as an accrual. I can already but [sic] out my vacation.

(J.A. 1012; 1019.) In the Director's Notes for the May 14, 2003, meeting, Graham also added the following line to his request: "This is the same as the notice from the last Board meeting." (J.A. 1019.) The Board approved both requests. Unlike his previous cash outs in January, Graham did not cash out accrued sick leave immediately after either of these Board meetings. However, on June 18, 2003, Graham filed two written requests to cash out a total of 250 hours of accrued sick leave. (J.A. 1308.) Both requests were approved by the Treasurer of the Board, Hazel Lusk

(Lusk). Subsequently, Lusk approved three more requests for Graham to cash out additional accrued sick leave on the following dates: July 29, 2003 (350 hours), January 14, 2004 (250 hours), February 10, 2004 (100 hours). (J.A. 1308.) The total amount of accrued sick leave Graham cashed out in 2003 and 2004 was $ 191,221.81 (gross) and $ 107,788.56 (net). (J.A. 1308.)

Beginning in January 2003, federal authorities launched an investigation into COA's business operations. By March 2003, West Virginia authorities commenced their own investigation into COA. On March 10, 2004, while West Virginia authorities were in COA's office reviewing records, the Board called an emergency meeting during which Graham's consolidated contract was revoked although the Board offered Graham continuing employment under revised terms. During the meeting, the Board also ordered Graham to repay all the sick leave he cashed out in 2003. The Board did not demand that Graham pay back the sick leave Graham cashed out in 2004. On March 11, 2004, Graham repaid COA the net proceeds of the sick leave he cashed out in 2003 and on March 26, 2004, he repaid COA the net proceeds of the sick leave he cashed out in 2004.

On July 18, 2006, a federal grand jury returned a second superceding 39 count indictment against Graham. After pleading not guilty to all of the charges and waiving his right to a jury trial, Graham's bench trial commenced on July 24, 2006. On August 30, 2006, the district court found Graham guilty of Count 14 of the Second Superceding Indictment, which charged Graham with stealing $ 31,129 from COA in 2004 by cashing out his sick leave in violation of his employment contract and *18 U.S.C. § 666*. In addition,

the district court ordered Graham to forfeit $ 31,129 as proceeds traceable to the *18 U.S.C. § 666* violation. The district court acquitted Graham on the remaining 38 counts.[3]

The Pre-Sentencing Report (PSR) concluded that Graham's offense level was 16. Included in that calculation was a +2 adjustment because Graham abused a position of trust that "facilitated the commission or concealment" of his crime.[4] *U.S.S.G. § 3B1.3*. The PSR stated that this provision was applicable because the Board "rubber stamped" all of Graham's decisions (J.A. 1312) and Graham took advantage of the Board's trust in order to facilitate his criminal conduct. Since Graham had no criminal history points, he was placed in Criminal History Category I. Based on a total adjusted offense level of 16 and a Criminal History Category of I, the advisory guideline sentence for Graham equaled 21-27 months.

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[3] It is worth noting that Count 13 mirrored Count 14, except that it concerned Graham's allegedly improper cash outs of accrued sick leave in 2003. However, because the district court found that Graham had only violated the consolidated contract by cashing out his leave in June and July 2003, but not in January 2003, the district court found him not guilty as to that count.

[4] Despite Graham's objection to the application of a two point enhancement for abuse of trust, the district court found that because of the Board's vulnerability and the fact that Graham effectively controlled the Board, the two point adjustment was proper. In addition, Graham objected to the loss calculation in the PSR because it included payments in 2003 for which he was acquitted. The district court denied Graham's objection, finding that since the payments Graham received in June and July 2003 were obtained without Board approval, those incidents were properly included as relevant conduct for purposes of sentencing.

The district court adopted the PSR's finding and sentenced Graham to 24 months imprisonment, a three year term of supervised release, and fined him $ 10,000. In addition, the district court ordered Graham to forfeit $ 31,129. Graham timely appealed the district court's judgment.

II.

In determining whether sufficient evidence exists to support a conviction, the appropriate inquiry is whether, taking the evidence in the light most favorable to the Government, any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *See e.g., United States v. Newsome, 322 F.3d 328, 333 (4th Cir. 2003)* ("The standard governing our review is whether there is substantial evidence, taking the view most favorable to the Government, to support [the jury verdict] and we have defined substantial evidence, in the context of a criminal action, as that evidence which a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." (internal citations and quotation marks omitted.)) We now apply this standard to the facts in this case.

> In its memorandum order, the district court found Graham guilty of Count 14 because: . . . the conclusion is inescapable that Graham cashed in the sick leave without the approval of his board, knowing he needed board approval, thereby effectively stealing the money or converting it to his own use. From the evidence taken at trial it is clear that defendant, an employee, took this money from COA without having any board approval whatsoever. These

> transactions each constituted major changes of the sort that required board approval. The fact that Graham sought board approval for the earlier cash outs of sick leave is compelling evidence that he knew such approval was required. Graham cavalierly disregarded the board and treated large amounts of COA's money as if it were his own, diverting it to his personal use and to the detriment of those whom COA and All-Care were created and funded to serve.

(J.A. 156.) The district court's holding was motivated by the fact that on three prior occasions Graham sought the Board's approval to cash out accrued sick leave. As a result, the district court reasoned that Graham knew that he needed board approval for each instance he cashed out accrued sick leave since the cash outs were impermissible under the terms of the consolidated contract.

The Government argues that there is substantial evidence to support the district court's decision. The Government contends that the evidence at trial demonstrates that Graham took advantage of a Board that was comprised of elderly, disabled, and uneducated men and women who rubber stamped all of his decisions. The Government argues that Graham should have explicitly informed the Board about how much sick leave he was actually going to cash out and made certain that the Board understood that his request was inconsistent with the terms of his contract.[5]

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[5] In support of its argument, the Government also cites to evidence that the district court did not rely on, including the fact

In order to convict Graham under *18 U.S.C. § 666*, the district court had to find, beyond a reasonable doubt, that Graham knowingly stole funds from COA. On this critical matter, we believe both the district court and the Government reached the wrong conclusion. Quite simply, Graham's cash outs in June and July of 2003 and January and February of 2004 were not contrary to the authority given to him by the Board. The Board repeatedly authorized Graham to buy out his accrued sick leave and did not place any restrictions on the amount of accrued sick leave he could cash out or the timing of these cash outs. As such, the timing and amount of the accrued leave cash outs are clearly insufficient for purposes of establishing Graham's intent to steal funds from COA.

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that Graham used some of the sick leave cash out money to buy things for his girlfriend. In addition, the Government contends that cashing out accrued sick leave was inconsistent with the written policy of COA and that Graham only reimbursed COA after the media began publishing stories about Graham's contract with COA. While these facts may demonstrate that Graham is not eligible for the priesthood, they are irrelevant so far as the district court's determination of guilt is concerned. As the district court concluded:

> The events leading to this indictment are improper and outrageous and cannot be condoned by the court. Graham failed miserably to fulfill his duties as a public servant, engaging in conduct that squandered public resources and adopting a life-style that reflected discredit upon COA and All-Care, their directors and employees. Bad conduct in and of itself, however, does not equal criminal conduct. To convict a defendant of a crime, the Government must establish beyond a reasonable doubt by competent evidence each and every element of each and every crime charged. (J.A. 912.)

In addition, the Board's actions during the March 2004 emergency meeting provide strong circumstantial evidence that it did not believe Graham violated any Board directives or that he attempted to bamboozle the Board in order to bilk COA out of hundreds of thousands of dollars. While the Board did reduce Graham's salary and benefits, it did not ask for Graham's resignation. In fact, Graham's salary and benefits were not reduced as a punitive measure, but rather at the behest of Graham in order to quell the media maelstrom that had overwhelmed the organization. (J.A. 1044.) As the Board stated in its summary of the emergency meeting:

> "[t]he Directors of the [COA] are very proud of the success and growth of the [COA] and believe that Robert E. Graham has worked diligently and on behalf of the [COA] for over 25 years and has brought success to the [COA] and regrets that the press has not emphasized such accomplishments."

(J.A. 1044.)

III.

In summary, the salient facts in the instant case, taken in the light most favorable to the Government are as follows: Graham received the Board's permission to cash out an indeterminate amount of his accrued sick leave. There was nothing in any of the Board's decisions that placed any limitations on when and how much accrued sick leave Graham could cash out. According to COA's independent audit, the gross value of Graham's accrued sick leave as of September 30, 2002, was $ 241,167. (J.A. 1087.) The total gross amount of sick leave Graham cashed out in 2003 and 2004 was $ 191,221.81, an amount that he conceivably

could have cashed out in January 2003 without violating any of the Board's decisions.

Based on these facts, a reasonable trier of fact could not find, beyond a reasonable doubt, that Graham knowingly stole any money from COA. Graham's consolidated contract with COA entitled him to cash out his accrued sick leave upon his termination or due to illness; however, the Board's decisions in January, March, and May of 2003 resulted in a de facto amendment that overrode these restrictions. In essence, the Board gave Graham the ability to cash out his accrued sick leave early without any limitation as to the amount of accrued sick leave he could cash out or a specific time period when such cash outs had to occur.

In addition, the evidence in the record clearly rebuts any accusation that Graham was trying to hide his cash outs in June/July 2003 and January/February 2004 - Graham filled out the proper leave forms to cash out his accrued sick leave on each occasion and the Board's treasurer approved the forms and signed the checks. The record is replete with minutes, notes, checks, and records of Graham's transactions, all of which were open to review by COA's independent auditors and COA's Fiscal Officer.[6] Indeed, the fact that Graham continued to cash out accrued sick leave after January 2003, the point at which the federal investigation into COA commenced, provides striking evidence that Graham did not knowingly steal any money from COA.

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[6] In fact, at one point, COA's Fiscal Officer questioned Graham's cash outs, and Graham accurately told her that the Board had approved the cash outs.

While we recognize that the amount of money cashed out by Graham is substantial, that issue is ultimately irrelevant because Graham had properly accrued all of that sick leave money during his tenure at COA and All Care. The pertinent question is whether the Board authorized him to cash out his sick leave in June/July 2003 and January/February 2004. We answer this question in the affirmative because on this record it is undisputed that the Board repeatedly authorized Graham to cash out his accrued sick leave without any limitations.

IV.

Based on the reasoning above, we reverse Graham's conviction and sentence and remand to the district court to enter a judgment of not guilty as to Count 14 of the Second Superceding Indictment.[7]

REVERSED

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[7] Because we are reversing Graham's conviction, it is unnecessary to address Graham's remaining contentions.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

10 F.3d 1278; 1993 U.S. App. LEXIS 31125

December 10, 1992, Argued

November 29, 1993, Decided

JOHN A. BETTS,

Petitioner-Appellant,

v. No. 91-3118

UNITED STATES OF AMERICA,

Respondent-Appellee.

PRIOR HISTORY: Appeal from the United States District Court for the Central District of Illinois, Springfield Division. No. 89 M 43. Richard Mills, District Judge.

DISPOSITION: REVERSED AND REMANDED WITH DIRECTIONS.

COUNSEL: For JOHN A. BETTS, Petitioner - Appellant: Kenneth A. Kozel, LaSalle, IL.

For UNITED STATES OF AMERICA, Respondent - Appellee: Thomas E. Karmgard, AUSA, Frances C. Hulin, AUSA, OFFICE OF THE UNITED STATES ATTORNEY, Danville, IL. Colin S. Bruce, AUSA, Edith C. Harris, OFFICE OF THE UNITED STATES ATTORNEY, Springfield, IL.

JUDGES: Before CUDAHY and ROVNER, Circuit Judges, and ESCHBACH, Senior Circuit Judge.
OPINION BY: ROVNER

OPINION

ROVNER, *Circuit Judge.* Attorney John Betts served fifteen days in jail on a criminal contempt conviction. We reversed his conviction and vacated the sentence, concluding that the court order he purportedly had transgressed was not sufficiently specific to support a conviction for contempt. *In re Betts, 927 F.2d 983 (7th Cir. 1991).* Betts then petitioned the district court for a certificate of innocence, the statutory prerequisite to a civil suit against the government for wrongful imprisonment. *See 28 U.S.C. § 2513.* The district court denied the petition, finding that Betts had brought about his own prosecution through "misconduct or neglect." *Betts v. United States, 770 F. Supp. 457 (C.D. Ill. 1991);* see *28 U.S.C. § 2513(a)(2).* We reverse.

I. BACKGROUND

We recounted in detail the events that led to Betts' conviction and imprisonment for contempt in our previous opinion. For present purposes, we need reiterate only a few key facts.

Ironically, Betts found himself charged with contempt in the course of defending a colleague, Kenneth Kozel, against identical charges. On Kozel's behalf, Betts had filed a motion to disqualify the district judge assigned to hear the matter. After an initial hearing on May 9, 1989, at which the district court heard argument and set a briefing schedule, the motion was taken under advisement. On June 5, 1989, the court issued an order setting the matter for a final hearing on June 19.

Approximately thirty minutes before the June 19th hearing began, the court received in the mail a letter from Betts explaining that neither he nor Kozel would be present:

> I have received a notice from you regarding an additional oral argument in this matter for the 19th in Springfield. I just simply am not available for that day regardless of how much I try to re-arrange matters. It had been my understanding from the previous time (May 9th) that you would rule by mail.
>
> So that the administration of justice is not in anyway [sic] delayed, I would respectfully inform the court that my client has waived his right to be there and to present any additional matters before the court. Our position has already been presented thru [sic] prior oral argument and in the written matter submitted previously. We assume that you do not have any questions for us or we would have heard from you in writing. We have nothing further to add.

The hearing proceeded in the absence of the defense, and the court denied the disqualification motion. At the government's request, the court also directed federal marshals to arrest Betts and Kozel for having willfully disobeyed its June 5th order by failing to attend the hearing. Kozel surrendered two days later, but convinced the court to quash the warrant for his arrest on the ground that his presence at the June 19th hearing was not compelled either by statute or by the June 5th order. Betts waited several weeks before he surrendered. He was then released on bond subject to the usual conditions, including a requirement that

he appear as commanded at all proceedings on the contempt charge against him.

The district court postponed resolution of the charge against Betts until it had resolved the original contempt charges against Kozel. After Kozel was convicted on two counts of contempt,[1] the district court ordered Betts to appear on December 8, 1989 to show cause why he should not be held in contempt for failure to attend the June 19th hearing.[2] Betts failed to appear on December 8, although Kozel (switching roles from client to counsel) appeared on his behalf. Kozel explained that Betts could not be present because he was hiding somewhere in the Chicago area to elude an outstanding warrant for his arrest in Ford county. The district court rescheduled the hearing for December 28.

Kozel appeared for the December 28th hearing but once again, Betts did not. His patience exhausted, the district judge issued another warrant for Betts' arrest.

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[1] We later affirmed Kozel's conviction. *United States v. Kozel, 908 F.2d 205 (7th Cir. 1990), cert. denied, 498 U.S. 1089, 112 L. Ed. 2d 1055, 111 S. Ct. 969 (1991).*

[2] This notice indicated that the contempt charge against Betts was civil rather than criminal in nature. That designation was erroneous, as the district court later noted, because from the start the contempt citation was based on a *fait accompli* and was not in any way remedial in nature. *In re Betts, 730 F. Supp. 942, 944 (C.D. Ill. 1990). See generally Hicks on behalf of Feiock v. Feiock, 485 U.S. 624, 631-32, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1988).* The error was corrected following the December 8th hearing, when the court issued an amended notice reflecting that Betts was being charged with criminal contempt. We point this out solely to clarify that Betts did nothing to cause the contempt charge to be changed from civil to criminal.

Federal marshals apprehended Betts on January 18, 1990, and he remained in custody until his trial on the contempt charge six days later. The district court found that Betts had willfully disobeyed its order to appear for the June 19th hearing and was thus guilty of violating *18 U.S.C. § 401(3)*.[3] *In re Betts, 730 F. Supp. 942 (C.D. Ill. 1990)*. The court sentenced Betts to three months in prison with all but 15 days suspended and with credit for time served. The court also imposed a six-month term of supervised release and ordered Betts to pay a special assessment of $25.

On appeal, we reversed Betts' conviction and vacated his sentence.[4] We noted that a conviction for criminal contempt requires a willful failure to comply with a lawful order of reasonable specificity. *927 F.2d at 986 (citing United States v. Burstyn, 878 F.2d 1322, 1324 (11th Cir. 1989)*, and *United States v. Kozel, 908 F.2d 205, 208 (7th Cir. 1990), cert. denied, 498 U.S. 1089, 112 L. Ed. 2d 1055, 111 S. Ct. 969 (1991))*. In our view, the June 5th order "flunked the 'reasonable specificity' test" *(927 F.2d at 987)*:

> When an appearance is required, the court's language must be very direct. There should be no doubt or uncertainty as to what is meant. . . . Here, it is impossible to discern from the way the order is phrased that Betts' personal

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[3] *Section 401(3)* grants a federal court the discretion to punish, by fine or imprisonment, "disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

[4] Although Betts had already served his sentence by the time we ruled on his appeal, we concluded that the case was not moot in view of the collateral consequences a criminal contempt conviction might have for an attorney. *927 F.2d at 988*.

> appearance was *required*. The court neither ordered the parties to appear for argument, nor did it indicate that Betts' presence was indispensable for it to render a decision. If a court order is ambiguous, "it precludes the essential finding in a criminal contempt proceeding of willful and contumacious resistance to the court's authority." *United States v. Joyce, 498 F.2d 592, 596 (7th Cir. 1974)*. Thus, it cannot be said that Betts' failure to appear at the June 19, 1989 hearing violated a court order, much less that the violation was willful.

The sight of an officer of the court being led away to jail does not make a pretty picture. Some attorneys--and, as we have seen over the past few years, even some judges--break laws and deserve prison sentences. Betts did not. We are certain that the antics of Betts and Kozel tried the patience of the court. . . . At a time when courts have to engage in judicial "triage" to accommodate the frightening number of drug and other cases clogging their dockets, *see* Labaton, *Scales of Justice Off Balance,* N.Y. Times, Dec. 29, 1989, at A1, col. 1, Betts and Kozel papered several courts (including this one) with numerous filings that distracted us from more pressing matters. This, however, is not a punishable crime. Given the fact the June 5, 1989, docket order did not state that the presence of Betts was *de rigueur,* Betts' conviction and resulting sentence cannot stand.

927 F.2d at 987-88 (emphasis in original).

Victorious on appeal, Betts returned to the district court requesting a certificate of innocence under *28 U.S.C. § 2513*, which would permit him to seek

compensation in the Claims Court for his incarceration. The government opposed the petition, arguing that Betts had brought about his own prosecution through misconduct or neglect. *See § 2513(a)(2).* The district court agreed:

> Betts clearly brought about his own prosecution through his own neglect and misconduct. Betts waited until the last moment to inform the Court that it was simply not convenient for him to appear at a scheduled hearing. After being apprehended, Betts violated a condition of his bond and attempted to avoid prosecution because of an outstanding arrest warrant issued by an Illinois court. In fact, it is uncertain that Betts would ever have appeared had he not been apprehended by the federal marshals.

770 F. Supp. at 460.

Betts appeals from the denial of his petition. We have jurisdiction pursuant to *28 U.S.C. § 1291. See Rigsbee v. United States, 92 U.S. App. D.C. 244, 204 F.2d 70, 73 n.3 (D.C. Cir. 1953).*

II. ANALYSIS

A. The Statute

Our analysis necessarily begins with the language of *section 2513.* A separate statute, *28 U.S.C. § 1495,* waives the government's sovereign immunity and allows suits for wrongful imprisonment in the Claims

Court.[5] But *section 2513* establishes the conditions under which such relief may be granted:

> (a) Any person suing under *section 1495* of this title must allege and prove that:
>
> (1) His conviction has been reversed set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction and
>
> (2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

Section 2513(b) requires either a court certificate or a pardon attesting to proof of these facts. *Section 2513(e)* caps the potential damages at $ 5,000.

B. Timeliness of the Appeal

Before reaching the merits, we must consider the government's contention that Betts' appeal is

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[5] *Section 1495* provides: The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim for damages by any person unjustly convicted of an offense against the United States and imprisoned.

untimely. The district court's order denying the petition for a certificate of innocence was docketed on August 8, 1991. Betts filed a motion to alter or amend the judgment on August 14, 1991, which was denied the same day. The notice of appeal was not filed until September 9, 1991--within the sixty days allowed for appeal in a civil action to which the government is a party, but well beyond the ten days allowed for appeal in a criminal case. *See Fed. R. App. P. 4(a), (b)*. The timeliness of the appeal therefore turns on whether the proceedings in the district court were civil or criminal in nature. The government contends that a petition for a certificate of innocence is necessarily a criminal matter because it requires the court to determine whether the petitioner committed a crime. The government also points out that Betts filed his petition under the same miscellaneous case number assigned to his criminal contempt proceeding, rather than seeking to have a separate, civil docket number assigned to the petition.

We must at the outset reject the notion that the type of docket number affixed to the petition by the district court clerk or by the petitioner himself determines whether the proceeding is criminal or civil. Here, of course, the clerk assigned a neutral "miscellaneous" number to the contempt proceeding, and Betts used the same number in filing his *section 2513* petition. But even if the petition had been assigned a criminal docket number, it would be of no moment. Motions that are technically filed "in" criminal proceedings may nonetheless be treated as civil for purposes of Appellate *Rule 4. See United States v. Taylor, 975 F.2d 402, 403 (7th Cir. 1992)*; *see also 28 U.S.C. § 2255*, R. 11 advisory committee's note. The substance and context, and not the label, of the proceeding appealed

from determine its civil or criminal character. *See United States v. Craig, 907 F.2d 653, 656* (7th Cir.), *amended on other grounds, 919 F.2d 57 (7th Cir. 1990), cert. denied, 111 S. Ct. 2013 (1991).*

We agree with the Sixth Circuit that a petition for a certificate of innocence is civil in nature. *See United States v. Brunner, 200 F.2d 276, 279 (6th Cir. 1952); accord McMurry v. United States, 15 M.J. 1054, 1055 (N.M. C.M.R. 1983).* A certificate of innocence serves no purpose other than to permit its bearer to sue the government for damages--a quintessentially civil action. Granted, in deciding whether or not to issue the certificate, the district court must consider whether the petitioner is truly innocent--that is, whether he committed the acts charged and, if so, whether those acts constituted a criminal offense (*§2513(a)(2)*); *Rigsbee, 204 F.2d at 72*)--but the court makes that determination independent of the outcome of the trial or appeal, taking into account not only whether the petitioner was innocent but also whether he may be deemed responsible for his own prosecution. The independent nature of the inquiry and the additional focus on responsibility suggest that a *section 2513* proceeding is an entirely collateral inquiry into the circumstances underlying the conviction. In this respect, we see no reason to treat it differently from the proceeding on a motion to correct, set aside or reduce a sentence under *28 U.S.C. § 2255*, which is deemed civil for purposes of Appellate *Rule 4. See United States v. Hayman, 342 U.S. 205, 209 n.4, 222, 96 L. Ed. 232, 72 S. Ct. 263 (1952); § 2255, R. 11* & advisory committee's note; *see also Craig, 907 F.2d at 656-57* (petition for writ of error coram nobis). If anything, the reasons for adopting the longer time period for civil appeals are even stronger here, where

the petitioner has not only been released from custody, *see id., 907 F.2d at 656*, but has already succeeded in vacating his conviction.

Betts accordingly had sixty days in which to appeal the district court's ruling, and he did so within that time. The government's motion to dismiss the appeal is therefore denied.[6]

C. Merits

Whether or not a petitioner is entitled to a certificate of innocence under *section 2513* is a question committed to the sound discretion of the district court. *Rigsbee, 204 F.2d at 72* & n.2; *Burgess v. United States, 20 Cl. Ct. 701, 704 (1990)*; *United States v. Keegan, 71 F. Supp. 623, 635 (S.D.N.Y. 1947)*. We must affirm the lower court's decision unless the court abused its discretion, or unless the findings underlying its decision were clearly erroneous. *See Rigsbee, 204 F.2d at 72 73; cf., e.g., Laborers' Pension Fund v. Dirty Work Unltd., Inc., 919 F.2d 491, 494 (7th Cir. 1990)*.

We start from the premise that *sections 1495* and *2513* were meant to provide compensation only to those who can show that they are innocent of any criminal offense. As the Claims Court has explained: The purpose of these statutes is to partially right an irreparable wrong done to a United States citizen who

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[6] Betts asks that we sanction the government for moving to dismiss the appeal, contending that it did so in bad faith and for purposes of delay. We discern no improper purpose, however, and although we have rejected the government's argument that this is a criminal matter governed by *Rule 4(b)*, we have not previously addressed this precise question. Moreover, as we observed in *Taylor, 975 F.2d at 403*, "drawing the line between criminal and civil for purposes of *Rule 4(b)* is difficult . . . ." Sanctions are therefore not warranted.

was wrongfully imprisoned through financial compensation. *McLean v. United States, 73 F. Supp. 775, 778 (D.C.S.C. 1947).* However, the legislative history indicates that Congress did not intend to indemnify every imprisoned person whose conviction had been set aside. *United States v. Keegan, 71 F. Supp. 623, 635 (D.C.N.Y. 1947).* Former United States Attorney General Cummings, in a letter embodied in the Report of the Senate Judiciary Committee [Report No. 202, 75th Congress, 1st Session] elaborated on the purpose and intent of the Unjust Conviction Act:

> Ideal justice would seem to require that in the rare and unusual instances in which a person has served the whole or part of a term of imprisonment, is later found to be entirely innocent of the crime of which he was convicted, should receive some redress. On the other hand, reversals in criminal cases are more frequently had on the ground of insufficiency of proof or on the question as to whether the facts charged and proven constituted an offense under some statute. Consequently, it would be necessary to separate from the group of persons whose convictions have been reversed, those few who are in fact innocent of any offense whatever.

Burgess, 20 Cl. Ct. at 704. See also Osborn v. United States, 322 F.2d 835, 840 (5th Cir. 1963) ("The claimant must be innocent of the particular charge and of any other crime or offense that any of his acts might constitute.") (quoting H.R Rep. No. 2299, 75th Cong., 3d Sess. 2); *Rigsbee, 204 F.2d at 72* (petitioner who was acquitted on re-trial after his conviction was reversed "must also show that the trial judge thought he did not commit the acts charged or that, if he did,

his acts were justifiable and so not criminal"); *Brunner, 200 F.2d at 280.*

Our prior opinion makes clear that Betts did not commit a criminal offense. *927 F.2d at 987-88.* As we explained, the order scheduling the June 19th hearing was not sufficiently specific to compel Betts' attendance; accordingly, Betts did not violate a court order in failing to attend. *Id. at 987.* In other words, we reversed Betts' conviction because he was truly innocent of contempt, not because there was some defect in the conviction unrelated to his culpability. This is not a case where the conviction was set aside for lack of jurisdiction, expiration of the statute of limitations, use of inadmissible evidence, or failure of proof beyond a reasonable doubt--that is, on a ground that leaves room for the possibility that the petitioner in fact committed the offense with which he was charged. *See Forrest v. United States, 2 M.J. 870, 874 (A.C.M.R. 1976)* (O'Donnell, J., dissenting), *aff'd, 3 M.J. 173 (C.M.A. 1977); see also Rigsbee, 204 F.2d at 72-73; Brunner, 200 F.2d at 280; Cratty v. United States, 83 F. Supp. 897, 899-900 (S.D. Ohio 1949).* Nor is this a case in which the petitioner's conduct constituted an offense other than the one for which he was tried and convicted. *See Sinclair v. United States, 124 Ct. Cl. 182, 109 F. Supp. 529, 531* (Ct. Cl.), *cert. denied, 345 U.S. 974, 97 L. Ed. 1390, 73 S. Ct. 1123 (1953); Weiss v. United States, 95 F. Supp. 176, 179 (S.D.N.Y. 1951).*[7] Betts' conduct, quite simply, did not

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[7] As the district court noted in *Keegan*, "in order for the commission of a crime other than that with which petitioner was charged[] to constitute grounds for denial of his certificate, such other crime must have been 'in connection with such charge.'" *71*

constitute a crime; he is, as the district court put it, "factually innocent." *770 F. Supp. at 459*. Betts has therefore satisfied *section 2513(a)(1)* and the first prong of *section 2513(a)(2)* by establishing that "his conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted" and that "his acts, deeds, or omissions . . . constituted no offense . . . ."

We thus turn to the second prong of *section 2513(a)(2)* and consider whether Betts caused or brought about his own prosecution by "misconduct or neglect." The language of this subsection has been described as "rather indefinite." *Keegan, 71 F. Supp. at 638*. Neither the statute nor the legislative history elucidates what kind of misconduct or neglect that will bar relief, and the case law is sparse. Some courts have suggested that if the petitioner engaged in wrongdoing that, in retrospect, was not illegal, he may be said to have brought about his prosecution through misconduct or neglect within the meaning of *section 2513(a)(2)*. *Weiss, 95 F. Supp. at 180*; *McMurry, 15 M.J. at 1056*; *Forrest, 2 M.J. at 873*. But the statute expressly requires a causal connection between the petitioner's conduct and his prosecution; it does not preclude relief simply because the petitioner engaged in misconduct or neglect, period. In a moral sense, perhaps, a person who engages in conduct that a prosecutor or trial court mistakenly believes to constitute a criminal offense might be said to have "brought about" his own prosecution, on the theory that he would not have been charged had he comported himself in a more upstanding fashion. Yet, construing the statute in that

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F. Supp. at 638 (quoting *18 U.S.C. § 730(b)*, the forerunner to *18 U.S.C. § 2513(b)*).

way would require courts to assess the virtue of a petitioner's behavior even when it does not amount to a criminal offense. We decline to interpret *section 2513(a)(2)* in that fashion.

Instead, we conclude that before the petitioner can be said to have caused or brought about his prosecution within the meaning of *section 2513(a)(2)*, he must have acted or failed to act in such a way as to mislead the authorities into thinking he had committed an offense. The clearest example would be the defendant who either falsely confesses to a crime or intentionally withholds exculpatory evidence--in common parlance, one who "takes the fall" for someone else. *Keegan* offers a more comprehensive list: "Examples of the misconduct referred to . . . are 'Where there has been an attempt to flee, a false confession, the removal of evidence, or an attempt to induce a witness or an expert to give false testimony or opinion, or an analogous attempt to suppress such testimony or opinion.'" *71 F. Supp. at 638* (quoting Edwin M. Borchard, "State Indemnity for Errors of Criminal Justice"). In these circumstances, a defendant has it within his means to avoid prosecution but elects not to do so, instead acting in such a way as to ensure it. In that sense, he is responsible for his own prosecution and deserves no compensation for his incarceration. The relevant conduct need not always be intentional--thus the statute's reference to "neglect" as well as "misconduct." Nonetheless, there must be either an affirmative act or an omission by the petitioner that misleads the authorities as to his culpability.

The district court cited two misdeeds on Betts' part that purportedly brought about his own prosecution: (1) Betts failed to apprise the court until the eleventh hour that he would be unable to attend the June 19,

1989 hearing; and (2) after his arrest, Betts violated a condition of his bond by failing to appear for two scheduled hearings on the contempt charge, apparently because he was busy attempting to evade the Ford County arrest warrant. *770 F. Supp. at 460.* Although we readily agree that this was not fitting behavior for an officer of the court, we cannot find that this misconduct "brought about" or "caused" Betts' contempt prosecution within the meaning of *section 2513(a)(2).*

Providing the district court no more than thirty minutes' notice of his inability to attend the June 19th hearing did not render Betts responsible for his contempt prosecution. The last-minute character of the notice understandably perturbed the district court and the prosecutor; and perhaps, had the notice been more timely, the prosecutor would not have asked that Kozel and Betts be arrested and the district court would not have pursued the contempt charge against Betts. But to whatever degree the late notice may have raised the ire of the prosecutor and the district court, it did not "cause" or "bring about" his prosecution in the sense of misleading them as to his liability for criminal contempt. The contempt charge was premised on the assumption that Betts had a duty to attend the June 19th hearing. As our previous opinion makes clear, however, the June 5th order scheduling that hearing did not explicitly require Betts' attendance; consequently, he was not legally obliged to appear. *927 F.2d at 987.* In this context, the amount of advance notice that Betts gave of his absence is immaterial. The mistaken assessment of the prosecutor and the district court that Betts was obligated to appear at the June 19th hearing had nothing to do with anything Betts did or failed to do in the way of notice; it was

simply an error in their construction of the order setting that hearing.

Although Betts' subsequent failure to appear for the first two hearing dates on the contempt charge may have constituted a violation of his bond, it is likewise irrelevant to whether or not he brought about his own prosecution. The contempt charge against Betts rested solely on his failure to attend the June 19th hearing. *See Betts, 730 F. Supp. at 945-47.* Betts' failure to attend two additional hearings in December 1989 thus had nothing to do with his liability on that charge. Perhaps, had Betts appeared at those hearings and shown contrition, the prosecution and the district court would have dropped the contempt charge. But even if we assume that Betts' continued absences hardened their resolve to pursue the charge, Betts still did not bring about his prosecution in the way *section 2513(a)(2)* envisions. Whatever cause Betts may have given the district court and the prosecution to believe that he needed strong discipline in order to conduct himself more responsibly, he did nothing that misled the court or the prosecutor into thinking that he had committed criminal contempt in failing to appear on June 19. Their belief, as we have explained, was based on an erroneous interpretation of the order scheduling that hearing, and Betts cannot be deemed responsible for that error.

The district court's finding that Betts brought about his own prosecution through neglect or misconduct was therefore clearly erroneous. Because the record discloses no other basis for denying the petition for a certificate of innocence, we must reverse the district court's decision.

III. CONCLUSION

Betts' conduct before the district court leaves much to be desired, and we certainly do not suggest that courts faced with similar behavior may not impose appropriate sanctions. But Betts' conduct was not criminal, and although it may have constituted misconduct or neglect, it did not render him responsible for the mistaken decision to prosecute him on the criminal contempt charge. We accordingly reverse the judgment of the district court. Because we conclude that Betts carried his burden of demonstrating that he did not bring about or cause his prosecution through misconduct or neglect, as well as each of the other prerequisites set forth in *section 2513*, we remand to the district court with directions to grant the petition for a certificate of innocence.

REVERSED AND REMANDED WITH DIRECTIONS.

No. 10-366

In the Supreme Court of the United States

ROBERT E. GRAHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
ROBERT A. PARKER
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether, following reversal of petitioner's embezzlement conviction for insufficient evidence of guilt beyond a reasonable doubt, petitioner proved that he was actually innocent and that he did not bring about his prosecution by misconduct or neglect and therefore that he was entitled to a "certificate of innocence" under 28 U.S.C. 2513.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-39a) is reported at 608 F.3d 164. The opinion of the district court (Pet. App. 41a-51a) is unreported but is available at 2006 WL 2527613.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 2010. The petition for a writ of certiorari was filed on September 10, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of West Virginia, petitioner was convicted of embezzlement from a program receiving federal funds, in violation of 18 U.S.C.

666(a)(1)(A). The district court sentenced petitioner to 24 months of imprisonment, to be followed by three years of supervised release. The court of appeals reversed petitioner's conviction on the ground that the evidence was insufficient to establish his guilt beyond a reasonable doubt. Petitioner then filed suit against the government in the United States Court of Federal Claims, seeking damages for unjust conviction and imprisonment under 28 U.S.C. 1495. The district court denied petitioner a "certificate of innocence," which, under 28 U.S.C. 2513, is a prerequisite to maintaining a suit under Section 1495. The court of appeals affirmed. Pet. App. 2a-28a.

1. Petitioner was the executive director of two nonprofit corporations in Wyoming County, West Virginia—the Council on Aging, Inc. (COA) and All Care Home and Community Services, Inc. (All Care). Pet. App. 4a. COA and All Care shared a board of directors (the Board), the members of which were "elderly * * *, hard of hearing, financially unsophisticated, and strongly influenced by [petitioner]." *Id.* at 6a. COA and All Care received substantial federal funding from Medicaid and the United States Department of Labor. *Id.* at 4a; Mem. Op. 2 (Aug. 30, 2006) (Bench Trial Verdict).

In 2001, petitioner submitted to the Board, and the Board approved, an employment contract that increased petitioner's annual salary from $125,000 to $185,000. Pet. App. 4a. Approximately four months later, the Board agreed to amend this contract to allow petitioner to accrue 16 hours of paid sick leave per month, retroactive to the beginning of his employment in May 1975. *Ibid.* The amended contract further provided that petitioner could convert his accrued sick leave into cash

compensation "if used for illnesses or upon the termination of this contract." *Ibid.*

In January 2003, even though petitioner had not satisfied the illness or termination conditions set forth in the contract, he sought the Board's permission to convert some of his sick leave into cash. Pet. App. 5a. When making the request, petitioner did not remind the Board of the contract's limitations on the conversion of sick leave. See *ibid.* The Board approved the request, and petitioner converted 1,200 hours of his accrued sick leave into a cash payment of $106,728. *Ibid.* Later that year, petitioner (again without satisfying the contractual conditions) made two more requests to the Board to convert sick leave into cash, which the Board approved. *Ibid.* In all, during 2003, petitioner converted sick leave into more than $160,000 of cash. *Ibid.* In January and February 2004, petitioner converted additional sick leave into cash payments totaling more than $31,000 without satisfying the illness or termination conditions. Petitioner did not inform the Board or obtain its approval for those additional conversions. *Ibid.*

In response to state investigations of alleged financial improprieties at COA and All Care, the Board convened an emergency meeting in March 2004 at which it revised the terms of petitioner's contract and ordered him to return all of the cash that he had obtained from conversions of his sick leave in 2003. Pet. App. 5a-6a. Petitioner complied with this demand. *Id.* at 6a. On the advice of his attorney, petitioner also repaid the cash he had obtained without the Board's approval in 2004. *Ibid.*

2. On July 18, 2006, a federal grand jury returned a second superseding indictment charging petitioner with 11 counts of mail fraud, in violation of 18 U.S.C. 1341, 1364 and 2; one count of wire fraud, in violation of

18 U.S.C. 1343 and 1346; ten counts of embezzlement from a program receiving federal funds, in violation of 18 U.S.C. 666(a)(1)(A); three counts of engaging in illegal monetary transactions, in violation of 18 U.S.C. 1957 and 2(b); 11 counts of filing false tax returns, in violation of 26 U.S.C. 7206(1); and three counts of aiding and abetting the preparation of a false tax return, in violation of 26 U.S.C. 7206(2).

Two of the embezzlement counts related to petitioner's conversion of sick leave into cash: Count 13 related to the conversions that took place in 2003 with the Board's approval, and Count 14 related to the conversions that took place in 2004 without the Board's approval. The remaining charges related to various other illegal schemes in which petitioner was alleged to have engaged, including unlawfully excluding other employees from the corporations' pension plan while directing pension payments to himself and members of his family; using the corporations' non-profit status to obtain a discount on a plasma television for his personal use; and falsifying tax returns to conceal his misdeeds. See Bench Trial Verdict 3-7, 12-14.

Petitioner pleaded not guilty and waived his right to a jury trial. Following a five-day bench trial, the district court found petitioner guilty on Count 14 and acquitted him on the remaining counts. Bench Trial Verdict 15. The court stated that the evidence at trial established that petitioner's conduct was "improper and outrageous," that he "failed miserably to fulfill his duties as a public servant," and that he "squandered public resources [while] adopting a lifestyle that reflected discredit upon COA and All Care, their directors and employees." *Id.* at 14-15. Nonetheless, the court concluded that "[b]ad conduct * * * does not equal crimi-

nal conduct," and the court found that the government had failed to prove beyond a reasonable doubt each element of most of the charges against petitioner. *Id.* at 15.

For example, the court found that although petitioner's conduct in acquiring the plasma television was "doubtlessly improper and unethical," it did not violate Section 666(a)(1)(A) or the mail fraud statute. Bench Trial Verdict 3-4. And although the government's allegations concerning the pension plan were supported by circumstantial evidence—including testimony that petitioner "personally decided who was eligible to participate in the [plan] and that some employees with whom [petitioner] had close relationships, including his children, were included in the [plan] even though other similarly situated persons were not included," *id.* at 6—the court determined that the evidence was not sufficient to establish beyond a reasonable doubt that petitioner knew that the plan was illegal. *Id.* at 6-7. The counts alleging falsification of tax returns largely related to petitioner's contributions to the pension plan, and the court therefore concluded that they had not been proven for the same reasons. *Id.* at 12-13.

With respect to petitioner's conversions of his sick leave in 2003, the district court concluded that, although the evidence established that the Board may not have fully understood petitioner's requests, its approval created reasonable doubt as to whether petitioner knew that his requests were improper. Bench Trial Verdict 9. With respect to the conversion of sick leave in 2004, however, the court found that petitioner "took this money from COA without having any Board approval whatsoever." *Id.* at 11. And because petitioner had earlier sought Board approval, the court found that "the

conclusion is inescapable that [petitioner] cashed in the sick leave * * * knowing that he needed Board approval, thereby effectively stealing the money or converting it to his own use." *Ibid.*

3. The court of appeals reversed petitioner's conviction. Pet. App. 56a-67a. It concluded that "a reasonable trial of fact could not find, beyond a reasonable doubt, that [petitioner] knowingly stole any money from COA." *Id.* at 66a. The court reasoned that it was "undisputed that the Board repeatedly authorized [petitioner] to cash out his accrued sick leave without any limitations." *Id.* at 67a. The court also noted that petitioner had not attempted to hide his actions, further suggesting that he lacked criminal intent. *Id.* at 66a. Although the court of appeals agreed with the district court that petitioner was "not eligible for the priesthood," *id.* at 64a n.5, the court of appeals determined that the evidence was insufficient to prove petitioner's guilt beyond a reasonable doubt, *id.* at 62a-66a.

4. Shortly thereafter, petitioner filed suit against the government in the United States Court of Federal Claims seeking damages based on a claim that he had been "unjustly convicted * * * and imprisoned," 28 U.S.C. 1495. In order to maintain such a suit, a defendant must prove that (1) his conviction was "reversed or set aside on the ground that he is not guilty of the offense of which he was convicted" and (2) he "did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States * * *, and he did not by misconduct or neglect cause or bring about his own prosecution." 28 U.S.C. 2513(a). The only admissible proof of those facts is "a certificate of the court" in

which he was convicted, 28 U.S.C. 2513(b), usually referred to as a "certificate of innocence," Pet. App. 3a.

The district court denied petitioner's request for a certificate of innocence. Pet. App. 41a-51a. The court noted that Section 2513 "does not mandate the payment of public funds to everyone who has spent time in custody and been ultimately acquitted." *Id.* at 45a. Instead, it provides compensation only for "the truly innocent who have been prosecuted through no fault of their own." *Id.* at 45a-46a. After carefully reviewing the record, *id.* at 47a-49a, the court concluded that petitioner had failed to prove, as required by the statute, that he was actually innocent of the crime of which he had been convicted. *Id.* at 50a. The court acknowledged that the court of appeals had concluded that the evidence was insufficient to establish petitioner's guilt beyond a reasonable doubt, but observed that "[a] finding on appeal that the evidence adduced at trial is insufficient to support a conviction beyond a reasonable doubt is not a legitimate basis for granting a certificate of innocence." *Ibid.* The court also held that petitioner had failed to establish that he did not, by his own misconduct or neglect, bring about his prosecution. *Ibid.* Indeed, the court concluded, the evidence against petitioner established that he had "abuse[d] [his] position of public trust for his own personal benefit" and "was at the very least negligent," and that this misconduct and neglect "brought about his prosecution on the count of conviction." *Id.* at 49a-50a.

5. The court of appeals affirmed. Pet. App. 2a-39a. It observed that Section 2513 required petitioner to prove three things: (1) his conviction was set aside on the ground that he was not guilty of the offense charged; (2) he, in fact,"did not commit any of the acts charged"

or, if he did, those acts did not constitute a crime; and (3) "he did not by misconduct or neglect cause or bring about his own prosecution." *Id.* at 14a (quoting 28 U.S.C. 2513(a)). The court noted that, in requiring a defendant to prove these three predicates, "Congress clearly did not provide * * * for monetary compensation to all whose criminal convictions are reversed after incarceration" but instead reserved relief only for the "truly innocent." *Id.* at 14a-15a.

The court of appeals found that petitioner had failed to satisfy the "rigorous burden" of proof established by Section 2513. Pet. App. 16a. The court noted that petitioner "presented no evidence in support of his application" but simply argued that he was entitled to a certificate of innocence because his conviction had been reversed. *Id.* at 22a. The court held, however, that "the [g]overnment's failure to offer sufficient evidence to prove [petitioner's] guilt [did] not require the district court, in considering the same evidence, to find him entitled to a certificate of innocence." *Id.* at 21a. The court explained that, although its prior decision had held that "the [g]overnment failed to meet its burden" to prove that petitioner "acted with a guilty state of mind," "to obtain a certificate of innocence, [petitioner] must address the same issue and prove, as a matter of fact, not only that he acted with no criminal intent, but also that no 'neglect' on his part caused his prosecution." *Id.* at 22a.

The court of appeals observed that it was "not at all clear that the district court [had] abuse[d] its discretion" in finding that petitioner had "failed to meet his burden" under "the first clause of § 2513(a)(2)" to show that he did not commit any of the acts charged or that those acts did not constitute a crime. Pet. App. 17a & n.3. And the

court of appeals concluded that, even assuming the district court did abuse its discretion in finding that petitioner had not proved his actual innocence, petitioner "ha[d] not demonstrated that the court abused its discretion in concluding that he failed to meet his burden under the second clause of § 2513(a)(2), i.e., that 'he did not by misconduct or neglect cause or bring about his own prosecution.'" *Id.* at 17a. The court of appeals explained that the district court had conducted a "painstaking, fact-intensive analysis of the evidence" that revealed a long history of "neglectful conduct" in petitioner's operation of COA's and All Care's affairs, including a "marked lack of prudence" in discharging his duties as a corporate officer and "damning" evidence of malfeasance. *Id.* at 18a, 21a-22a. The court of appeals concluded that, even though that evidence was ultimately insufficient to prove guilt beyond a reasonable doubt, it provided "a reasonable basis for [g]overnment officers to prosecute, leading them to conclude (as indeed the trier of fact did) that [petitioner] committed a federal offense by stealing from his employer." *Id.* at 19a.

The court of appeals also concluded that *Betts* v. *United States*, 10 F.3d 1278 (7th Cir. 1993), does not support petitioner's claim. Pet. App. 19a-20a. The court explained that the Seventh Circuit held in *Betts* that a defendant "fails to satisfy the second clause of § 2513(a)(2) only when he has 'acted or failed to act in such a way as to mislead the authorities into thinking he had committed an offense.'" *Id.* at 19a (quoting *Betts*, 10 F.3d at 1285). To the extent that standard requires that a defendant have willfully misled the authorities, the court of appeals disagreed with that interpretation because it "effectively reads 'neglect' out of the statute."

Id. at 19a-20a. Nonetheless, the court concluded, "even if [it] accept[ed] the *Betts* construction of § 2513, [the court] could not conclude that the district court abused its discretion here," *id.* at 20a, because petitioner's repeated failures to seek or obtain the Board's approval for his sick leave conversions in 2004 were deliberate "omission[s] by the petitioner that misle[d] the authorities as to his culpability." *Id.* at 21a (quoting *Betts*, 10 F.3d at 1285) (brackets in original).

Judge Gregory dissented. Pet. App. 28a-39a. He argued that the "misconduct and neglect" language in Section 2513 should be interpreted as referring not to the "conduct which was found to be noncriminal," but instead "to some *additional* conduct" that occurred later, "during the course of the government's investigation," and that "induced the government to commence a wrongful prosecution." *Id.* at 32a-33a. The majority rejected the dissent's interpretation because the statutory language contains no such limitation; the dissent's interpretation would be inconsistent with the statute's purpose and is not supported by any appellate decision interpreting the statute (including *Betts*); and the dissent's proposed limitation is illogical because acts of "misconduct or neglect" that bring about a prosecution "often will have originally been charged as crimes, as they were here." *Id.* at 23a-27a.

ARGUMENT

Petitioner contends (Pet. 11-12) that the decision of the court of appeals conflicts with the Seventh Circuit's decision in *Betts* and that this Court should grant review to resolve the "uncertainty" about the meaning of Section 2513. Contrary to petitioner's contention, the decision below is correct and does not conflict with *Betts* or

with the decision of any other court of appeals. Moreover, the issue presented arises very infrequently. Accordingly, the court of appeals' fact-bound determination that petitioner failed to prove that he is entitled to a certificate of innocence does not warrant this Court's review.

1. Because Sections 1495 and 2513 waive the sovereign immunity of the United States, they must be strictly construed in favor of the sovereign. *Orff* v. *United States*, 545 U.S. 596, 601-602 (2005); see Pet. App. 16a (citing cases). Consistent with that principle, the few decisions interpreting Section 2513 and its predecessors have uniformly concluded that the statute "provides compensation only to those who can show that they are innocent of any criminal offense." *Betts* v. *United States*, 10 F.3d 1278 1283 (7th Cir. 1993); see *Osborn* v. *United States*, 322 F.2d 835, 840 (5th Cir. 1963) (Wisdom, J.) ("Congress carefully limited the availability of the Unjust Conviction Statute to those who are truly innocent."); *United States* v. *Brunner*, 200 F.2d 276, 279-280 (6th Cir. 1952) (concluding that the statute requires a defendant to prove that he is "altogether innocent"); accord *United States* v. *Racing Servs., Inc.*, 580 F.3d 710, 713 (8th Cir. 2009); *Rigsbee* v. *United States*, 204 F.2d 70, 72 (D.C. Cir. 1953); Pet. App. 14a-15a.

The statute's legislative history confirms that Congress did not intend to "open[ ] wide the door through which the treasury may be assailed by persons erroneously convicted." *Brunner*, 200 F.2d at 280. Rather, Congress intended to provide monetary relief only in those "rare and unusual" cases in which a defendant proves that he was "in fact innocent of any offense whatever." S. Rep. No. 202, 75th Cong., 1st Sess. 3 (1937) (statement of Attorney General Homer Cummings).

Indeed, the legislative history reveals that Congress explicitly contemplated cases like petitioner's in which the conviction is reversed because of insufficient evidence, and Congress concluded that such reversals would not suffice to demonstrate actual innocence. See *ibid.* (distinguishing cases in which reversals are based "on the ground of insufficiency of proof" from the cases of innocence for which the statute permits compensation); H.R. Rep. No. 2299, 75th Cong., 3d Sess. 2 (1938) ("[T]he claimant must be innocent of the particular charge and of any other crime or offense that any of his acts might constitute. The claimant cannot be one whose innocence is based on technical or procedural grounds, such as lack of sufficient evidence."); see also *Betts*, 10 F.3d at 1284 (discussing legislative history); *Osborn*, 322 F.2d at 840 (same); Pet. App. 15a n.2 (same).

In this case, after a "painstaking, fact-intensive analysis of the evidence that had been admitted during [petitioner's] five-day bench trial," Pet. App. 22a, the district court determined that the lack of sufficient evidence to prove that petitioner was guilty beyond a reasonable doubt did not mean that he was actually innocent, and petitioner had submitted no additional evidence to satisfy his burden of proving his innocence. See *id.* at 47a-47a, 50a. The court of appeals not disturb the district court's determination on appeal. *Id.* at 17a & n.3. On the contrary, the court of appeals concluded that it was "not at all clear" that the district court had abused its discretion. *Ibid.* The court of appeals explained that "[o]n direct appeal, [it had] concluded only that the [g]overnment failed to prove [that petitioner] harbored the requisite intent." *Ibid.* And the court stressed that "reversal based on 'failure of proof beyond a reasonable

doubt' also 'leaves room for the possibility that the petitioner in fact committed the offense with which he was charged.'" *Ibid.* (quoting *Betts*, 10 F.3d at 1284).[1]

The district court's undisturbed determination that petitioner is not entitled to a certificate because he did not prove his actual innocence is entirely consistent with *Betts*. The conviction in *Betts* was reversed, not for insufficient evidence, but because the defendant's conduct "did not constitute a crime." 10 F.3d at 1284. And the Seventh Circuit did not suggest that a defendant whose conviction was reversed on sufficiency grounds and who submitted no additional evidence of innocence would be entitled to a certificate. On the contrary, the court stated that, to obtain a certificate, a defendant must prove his actual innocence and that reversal of a conviction "based on failure of proof beyond a reasonable doubt" is not equivalent to a finding of innocence. *Ibid.*

The fact-bound determination that petitioner did not prove his innocence does not warrant this court's review, and petitioner does not seek review on that question. See Pet. i. Accordingly, a decision in petitioner's favor would not afford him any relief, and the petition should be denied for that reason alone.

2. In addition, the court of appeals held that, even assuming the district court abused its discretion in find-

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[1] In dissent, Judge Gregory contended (Pet. App. 30a-31a) that the reasoning of the court of appeals' earlier decision established that petitioner is actually innocent, because the earlier decision stated that the Board's approval of petitioner's sick-leave conversions in 2003 resulted in "a de facto amendment" of his written contract. *Id.* at 31a. The court rejected that contention, however, holding that its earlier decision "concluded only that the [g]overnment failed to prove [petitioner] harbored the requisite intent." *Id.* at 17a n.3; see also *id.* at 21a (noting that the court's statements about the effect of the Board approvals were made "in narrowly addressing the issue of criminal intent").

ing that petitioner failed to prove his actual innocence, petitioner still would not be entitled to a certificate, because the district court correctly found that petitioner failed to prove that he did not "bring about his own prosecution" through "misconduct or neglect." Pet. App. 17a (quoting 28 U.S.C. 2513(a)(2)). That requirement "exclude[s] from the operation of the remedial provisions of the statute those who, though innocent, had negligently or willfully failed to take the necessary measures to avoid conviction." *Osborn*, 322 F.2d at 843. The courts below correctly concluded that petitioner falls within that category. Petitioner's fact-bound disagreement with the concurrent determinations of the two lower courts does not warrant this Court's review. See *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

As noted above, the district court conducted a "painstaking, fact-intensive analysis of the evidence that had been admitted during [petitioner's] five-day bench trial." Pet. App. 22a. After "review[ing] all of the evidence relevant to [petitioner's] conduct and state of mind," the district court found that petitioner had engaged in numerous willful or negligent acts in connection with his stewardship of COA and his cashing-out of sick leave and that those actions "brought about his own prosecution." *Id.* at 18a-19a. As the court of appeals concluded, "ample record evidence support[ed] that finding" because petitioner's acts and omissions reasonably led government officers "to conclude (as indeed the trier of fact did) that [petitioner] committed a federal offense by stealing from his employer." *Id.* at 19a.

Petitioner argues (Pet. 5-6, 12) that the court of appeals' conclusion conflicts with *Betts*, but he is mistaken.

In *Betts*, the Seventh Circuit held that the "misconduct or neglect" provision in Section 2513(a)(2) precludes issuance of a certificate of innocence when there was "a causal connection between the petitioner's conduct and his prosecution." 10 F.3d at 1285. *Betts* further held that this "causal connection" can be established by evidence showing that the defendant "acted or failed to act in such a way as to mislead the authorities into thinking he had committed an offense," such as where the defendant "'takes the fall' for someone else" by "falsely confess[ing] to a crime or intentionally withhold[ing] exculpatory evidence." *Ibid.* The critical requirement, the *Betts* court held, is "an affirmative act or an omission by the petitioner that misleads the authorities as to his culpability." *Ibid.*

The court of appeals in this case expressed disagreement with *Betts*'s "narrow reading" of the statute, observing that *Betts*'s standard appears to require "willful misconduct" and thus "effectively reads 'neglect' out of the statute." Pet. App. 20a. But the court of appeals made clear that its disagreement with *Betts* had no bearing on the resolution of this case, because, "even if [the court] did accept the *Betts* construction of § 2513, [the court] could not conclude that the district court abused its discretion here." *Ibid.* The court of appeals explained that petitioner's conduct, such as his intentional and repeated failures to seek Board approval for his sick-leave conversions, constituted "omission[s] by the petitioner that misle[d] the authorities as to his culpability." *Id.* at 21a (quoting *Betts*, 10 F.3d at 1285). Because petitioner would not be entitled to a certificate of

innocence under the standard articulated in *Betts*, the decision below does not conflict with *Betts*.[2]

3. In any event, as the court of appeals noted, federal courts do not "regularly ha[ve] occasion to consider certificates of innocence," and only six circuit court decisions (including the decision below) have interpreted Section 2513 or its predecessors since the first such statute was enacted in 1938. Pet. App. 19a n.4 (citing cases). The infrequency with which the issue presented by the petition arises and the corresponding dearth of cases addressing the issue further counsel against this Court's review.

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[2] Contrary to Judge Gregory's view in dissent (Pet. App. 35a-36a), *Betts* did not hold (or even suggest) that the "misconduct or neglect" that disqualifies a defendant from receiving a certificate must be separate from, and occur subsequent to, the conduct for which the defendant was criminally prosecuted. On the contrary, the court in *Betts* devoted extensive discussion to the question whether Betts's belated notification that he would be unable to attend a hearing caused his prosecution for contempt for failing to attend that hearing. 10 F.3d at 1285-1286. The court ultimately concluded that the belated notification did not cause Betts's prosecution, because the prosecution resulted from the trial court's mistaken belief that Betts had been ordered to attend the hearing, and the untimely notification did nothing to foster that mistaken belief. *Ibid.* The discussion of that issue would not have been necessary if *Betts* had adopted a rule that the disqualifying "misconduct or neglect" must be separate from and occur subsequent to the conduct for which the defendant was prosecuted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

LANNY A. BREUER
Assistant Attorney General

ROBERT A. PARKER
Attorney

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